No. 75-1805

In the Supreme Court of the United States

OCTOBER TERM, 1975

GARLAND JEFFERS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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AUTHORITIES CITED

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TO: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

Petitioner, Garland Jeffers, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 30, 1976. A timely petition for rehearing was filed and denied on May 18, 1976.

OPINION BELOW

The opinion of the Court of Appeals, which has not yet been reported, appears as Appendix A. The order denying the petition for rehearing appears as Appendix B.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 30, 1976. A timely petition for rehearing was filed and denied by order of the Court on May 18, 1976. This Petition is filed within thirty days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

1. Was the double jeopardy clause of the Fifth Amendment violated when the Court of Appeals, relying upon this Court's decision in *Iannelli* v. *United States* (420 U.S. 770), held that there may be a conviction on a greater offense of a continuing criminal enterprise after a conviction on a lesser offense of conspiracy.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment Five, Constitution of the United States of America:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

A law of the United States of America involving the crime of a continuing criminal enterprise, Title 21 U.S.C. §848:

> (a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).
>
> (2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—
>
> (A) the profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.
>
> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
>
> (1) he violated any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C.Code, sec. 24-203 to 24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

STATEMENT OF THE CASE AND FACTS

Petitioner, Garland Jeffers, was indicted in the Northern District of Indiana on March 18, 1974 for the crimes of conspiracy to distribute narcotics in violation of Title 21 U.S.C. §846. Jeffers was also indicted on the same date for a violation of Title 21 U.S.C. §848, a continuing criminal enterprise. In June, 1974 Jeffers was tried and convicted on the conspiracy indictment and was sentenced to fifteen years in prison. Subsequently, Jeffers was tried and convicted, over his double jeopardy claims, of a continuing criminal enterprise. Jeffers was sentenced to life on the continuing criminal enterprise conviction.

Prior to the second trial, Jeffers filed a Motion to Dismiss the continuing criminal enterprise indictment on the grounds that it was barred by his conviction on the lesser included charge of conspiracy to distribute narcotics. The District Court denied the Motion, and the Court of Appeals affirmed.

The indictment for a continuing criminal enterprise and the conspiracy arose out of the same drug operations in Gary, and the government used much of the same evidence at the second trial. The Court of Appeals (See App. A, page 6) felt there was no doubt that the indictments covered the same period of time and involved the same narcotics distribution ring.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS COMMITTED ERROR BY HOLDING THE DOUBLE JEOPARDY RULE DID NOT APPLY TO PETITIONER'S SECOND DRUG CONVICTION

Petitioner was indicted in March, 1974, for two drug crimes—conspiracy to distribute heroin in violation of 21 U.S.C. §846 and a continuing criminal enterprise in violation of 21 U.S.C. §848. Both of these charges were made under the Drug Abuse, Prevention and Control Act of 1970. Part D. of the Act provides for the legislative scheme of offenses and penalties. A brief outline of the various sections is:

§841—unlawful distribution—up to 15 years

§842—improper actions of a registrant—civil penalty

§843—improper distribution by a registrant; use of a forged prescription, etc., use of a communication facility to commit a felony—up to 4 years

§844—simple possession—up to one year

§845—distribution to persons under twenty-one—up to 30 years

§846—conspiracy—up to maximum time for the offense

§847—additional penalties—all in addition to any other civil or administrative penalty

§848—continuing criminal enterprise—10 years to life

§849—special drug offenders—up to 25 years

§850—information for sentencing

§851—proceedings to establish prior convictions

The conspiracy offense is defined:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (21 U.S.C. §846)

The continuing criminal enterprise offense is defined:

> . . . (A) person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person *in concert* with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources. (21 U.S.C. §848(b); emphasis supplied.)

Garland Jeffers (Petitioner) was indicted for two crimes under these drug control laws. Jeffers was convicted of a conspiracy and then convicted of a continuing criminal enterprise. Jeffers, as Petitioner to the United States Supreme Court, contends that his subsequent prosecution for a continuing criminal enterprise was barred by his previous conviction for a conspiracy. Petitioner argues that his conviction on a lesser included offense prohibits his subsequent trial on the greater offense.

CONVICTION OF A LESSER INCLUDED OFFENSE BARS PROSECUTION FOR GREATER

Petitioner contends that one of the double jeopardy rules is that a conviction of a lesser included offense bars prosecution for the greater offense. This rule is stated in 1 Wharton's Criminal Law and Procedure (Anderson, 1957), §135, pp. 294-295:

> . . . (A) conviction of a lesser offense bars a subsequent prosecution for a greater offense in all those cases where the lesser offense is included in the greater offense, and vice versa.

This principal has recently been reaffirmed in *Robinson* v. *Neil,* 409 U.S. 505 (1973). A state prisoner began the proceedings by a federal habeas corpus action. Robinson had been convicted of assault and battery in violation of a Chattanooga City ordinance. Robinson was then convicted of assault with intent to murder and received prison time. Both convictions arose out of the same series of events. Robinson, in his habeas corpus action, claimed that the rule of double jeopardy was violated by his second conviction. See *Robinson* v. *Neil,* 366 F.Supp. 924 (E.D.Tenn. 1973). The case worked its way to the Supreme Court where it was remanded for a determination as to whether the two sets of prosecution were actually for the same offense. *Robinson* v. *Neil,* 409 U.S. 505 (1973). On remand, the federal district court applied that same evidence test of *Blockburger* v. *United States,* 294 U.S. 299 (1932). The Court held:

> In the present case, conviction of the greater offense requires proof of an additional fact, i.e., intent to commit murder, but, by definition, the lesser offense does not include an additional element. Bearing in mind that the "same evidence" test requires that *each* offense must entail the "proof of an additional fact which the other does not" to render the defense of double jeopardy unavailable, it becomes apparent that a conviction of a lesser included offense bars a subsequent prosecution for the greater offense. (Citation of authority omitted.)
>
> • • •

As stated by Judge Miller in *United States* v. *Engle,* 458 F.2d 1021 at 1025 (6th Cir. 1972):

> "(The double jeopardy clause) is intended to prevent vexatious, piecemeal prosecution whether the result of an intent to harass, a desire to have more than one shot at obtaining a conviction or severe sentence, a mere prosecutorial caprice or carelessness."
>
> If the State were allowed to initiate separate prosecutions against a defendant for every crime up the ladder from the lesser to the greater offense, the potential for abuse and oppression would be too great to be tolerated in a society concerned for the rights of the individual. The double jeopardy clause stands as a bar to such a potential.
>
> • • •
>
> It is clear that the Constitution prohibits the trial of a person for the offense where he has been previously charged with and convicted of a lesser included offense arising out of the same act or activity.
>
> • • •
>
> The decision reached herein does not impose an undue hardship on the State. It merely requires that the prosecution of individuals accused of criminal activity be managed in such a way that those individuals are not forced to climb a ladder of multiple criminal prosecutions from the 'least' included offense to the greatest. *Robinson* v. *Neal,* 366 F.Supp. at 927, 928, 929.

The Petitioner (Jeffers) has been forced to climb the ladder of multiple prosecutions. He was tried and convicted

of the lesser included offense of conspiracy, and then tried for the greater offense of a continuing criminal enterprise. In *United States* v. *Ball,* 163 U.S. 662, at 669 (1896), this court said:

> The Constitution of the United States, in the Fifth Amendment, declares "nor shall any person be subject (for the same offense) to be twice put in jeopardy of life or limb." The prohibition is not against twice punished, but against being twice put in jeopardy.

This constitutional principle was repeated in *Green* v. *United States,* 355 U.S. 184, at 187 (1957):

> The underlying idea, one that is deeply engrained in at least Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjected him to embarrassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, . . .

Petitioner would point out that the Court of Appeals has agreed with this basic double jeopardy principle, but has avoided its implication by claiming that the Supreme Court has created a new double jeopardy rule. The Court of Appeals held that *Iannelli* v. *United States,* 420 U.S. 770 (1975) allowed multiple prosecutions of highly complex statutory crimes, without being constrained by the lesser included offense rule. The Court of Appeals stated:

> In regard to highly complex statutory crime, however, the included offense tests are often not appropriate to determine whether two offenses should be classed as "the same," because often, even though these offenses meet the included offense test, they are directed at quite different results.
>
> • • •

> From this analysis, then, we conclude that the conspiracy charged in the first indictment and the continuing criminal enterprise charged in the second indictment were not the 'same offense' for double jeopardy purposes, and a prior conviction on the first indictment did not bar prosecution on the second.
>
> (Court of Appeals opinion, App. A, pages 15, 18-10.)

Petitioner contends that the *Iannelli* decision does not overrule the double jeopardy principles set forth in *Robinson* v. *Neil.*

The *Iannelli* decision allowed separate prosecution for a §1955 gambling violation and a §371 conspiracy violation. The Court's decision was concerned with the application of the Wharton's Rule to prosecutions for two crimes mentioned. The Court held that Wharton's Rule did not apply and permitted the two prosecutions. Petitioner points out that the §1955 gambling offense does not require action in concert; that is, there is no requirement of any conspiracy in the gambling offense. Therefore, in *Iannelli* there was no issue of a lesser included offense rule. The Court clearly ruled that the definitions of the gambling activities and conspiracy were separate and different. The Court stated:

> But the §1955 definition of "gambling activities" pointedly avoids reference to conspiracy or to agreement, the essential element of conspiracy. Moreover, the limited §1955 definition is repeated in identifying the reach of §1511, a provision that specifically prohibits conspiracies. Viewed in this context, and in light of the numerous references to conspiracies throughout the extensive consideration of the Organized Crime Control Act, we think that the limited congressional definition of "gambling activities" in §1955 is significant. The Act is a carefully crafted piece of legislation. Had Congress intended to foreclose the possibility of prosecuting conspiracy of-

> fenses under §371 by merging them into prosecutions under §1955, we think it would have so indicated explicitly. It chose instead to define the substantive offense punished by §1955 in a manner that fails specifically to invoke the concerns which underlie the law of conspiracy. *Iannelli* v. *United States,* 420 U.S. at 786 (1975)

The Court of Appeals completely ignored this statement. The Court held that in order to violate §1955 there had to be "some sort of concerted activity", and this would be a conspiracy. See Appendix A, page 12. The Court of Appeals opinion is in direct conflict with this Court's holding in *Iannelli.* In *Iannelli* this Court did not find a §371 conspiracy to be a lesser included offense of a §1955 gambling offense. The Court of Appeals in the case at bar found that "(b)y a traditional analysis, the conspiracy charge is a lesser included offense of a substantive charge under §1955." (Appendix A, page 13.) Petitioner would point out that this confusion is the crux of this petition for Certiorari. If the Court in *Iannelli* nad treated a conspiracy and the gambling offense in such a manner, then there would be grounds to say that a new double jeopardy rule was created. *Iannelli* did not do so. Justice Powell seemed to acknowledge the limits of the *Iannelli* holding in footnotes 17 and 18. (420 U.S. at 785.) Justice Powell commented that the statutory elements of the offenses are the determining facts in deciding whether the crimes are merged under the Wharton's rule or the same evidence rule of *Blockburger.* Petitioner contends that the Court of Appeals has made an improper reading of *Iannelli. Iannelli* did not, and does not, hold that the lesser included offense rule becomes invalid in light of complex statutory crimes.

Since Justice Powell stressed that the statutory definition of the different crimes must be looked to for guidance

in the application of the same evidence rule, the definition of a continuing criminal enterprise must be examined. Petitioner argues that Congress specifically included conspiracy in the definition of a continuing criminal enterprise. In 21 U.S.C. §848 (b)(2)(A) a continuing criminal enterprise is defined to include a series of drug violations "which are undertaken by such person *in concert* with five or more other persons . . . ." The presence of the phrase "in concert" obviously removes any question that concerted activity, i.e., conspiracy, is required. The gambling offense in *Iannelli* did not have the requirement that the gambling business be *"in concert"* with others. Thus, a conspiracy is a lesser included of a continuing criminal enterprise. In this regard, the Court of Appeals was correct when it stated:

> Conspiracy to distribute narcotics falls within the definition of a lesser included offense of continuing criminal enterprise. The elements of a continuing criminal enterprise include, inter alia, that the accused engaged in a continuing series of violations of the Controlled Substances Acts which are undertaken *in concert* with five or more other persons with respect to whom the accused occupies some supervisory position. Since a criminal enterprise charge requires proof that the accused acted *in concert* with five or more persons, it required proof of a conspiracy.
>
> (Emphasis in opinion; Appendix A, pages 7-8.)

Therefore, applying the traditional lesser included offense rule, Petitioner's conviction of the greater offense after a conviction of the lesser included is barred.

The Court of Appeals attempted to justify a modification of the lesser included offense rule. First, the Court stated that since this was an area of highly complex statutory crimes, the rule should not apply. (See Appendix A, page 15.) There is no authority for the proposition that

the complexity of criminal legislature warrants the abandonment of a constitutional right. The Court of Appeals continued with this theory by pointing out that a conspiracy and a continuing criminal enterprise were aimed at different results. The conspiracy was at concerted criminal activity, and the continuing criminal enterprise was at the person who profited from a successful drug conspiracy. The Court of Appeals claimed this fact justified the abandonment of the double jeopardy rule. A continuing criminal enterprise is a different crime from conspiracy because it requires several additional elements. This fact does not mean that it is a different crime for purposes of the double jeopardy rule. The criterion to be used is whether or not a continuing criminal enterprise can be committed without a conspiracy. The Court of Appeals has admitted that it cannot. (See Appendix A, page 7.) In reading the various sections involved in these drug offenses, the statutory scheme seems clear. A stair-step approach was used; simple possession, §844, up to one year; using a forged prescription, §843, up to four years; unlawful distribution, §841, up to fifteen years; conspiracy to distribute, §846, up to fifteen years; special drug offender, §849, up to twenty-five years; distribution to one under twenty-one, §845, up to thirty years; and finally, a continuing criminal enterprise, §848, up to life. This scheme does not make each crime a completely separate offense; that is, each crime does not have an element that none of the others have. The statutory scheme shows an intent to punish the more serious drug offenders. This can be done, but it must be done within the confines of constitutional protections. Drug rings pose a serious threat to our society, but this is sufficient justification to abandon traditional constitutional rights.

Secondly, the Court of Appeals justified a modification of the lesser included offense rule due to the complexity

of the drug laws, because a prosecutor could be caught off guard as to what was a lesser included offense. (See Appendix A, pages 18-19, footnote 12.) How could a prosecutor's ineptness justify a modification of a constitutional right? The Court of Appeals has simply attempted to justify an incorrect decision by irrelevant and ancillary considerations. This is similar to the government's argument in favor of domestic surveillance because of the number of bombings occurring in the United States. See *United States* v. *United States District Court,* 407 U.S. 297 (1972). Petitioner would argue that there should be an impartial, consistent, and eager application of constitutional protections. As this Court said in *Quinn* v. *United States,* 349 U.S. 155, at 162 (1955) concerning the self-incrimination clause:

> To apply the privilege narrowly or begrudgingly—to treat it as a historical relic, at most merely to be tolerated—is to ignore its development and purpose.

The Court of Appeals has stated that the double jeopardy clause just is not valid anymore—that if there is some reason for abandoning lesser included offense rule, the court should do so. Petitioner contends that such casual treatment of a protected constitutional right is a serious threat to our free society.

CONCLUSION

Wherefore, for the above and foregoing reasons, the Petitioner respectfully prays this Court issue its Writ of Certiorari to the Court of Appeals for the Seventh Circuit to review the affirmance of Petitioner's conviction of a continuing criminal enterprise.

Respectfully submitted,

STEPHEN C. BOWER
Attorney for Petitioner

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1422

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARLAND JEFFERS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division—
No. H-CR-74-57
ALLEN SHARP, *Judge.*

ARGUED JANUARY 14, 1976—DECIDED MARCH 30, 1976

Before PELL and SPRECHER, *Circuit Judges,* and PARSONS, *Chief District Judge.**

SPRECHER, *Circuit Judge.* This appeal arising from the conviction of defendant for engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848 primarily concerns the question of whether the conviction is barred on double jeopardy grounds by a prior conviction for conspiracy to distribute narcotics.

---

* Chief District Judge James B. Parsons of the United States District Court for the Northern District of Illinois is sitting by designation.

I

The evidence presented at trial showed that the defendant, Garland Jeffers, was the head of a highly-structured narcotics distribution network which operated in Gary, Indiana from January of 1972 to mid-March of 1974. The organization, known as "the Family," was formed by Garland Jeffers and five others to organize and control the drug traffic in the city of Gary. Although, at first, the defendant did not head up the Family, he quickly assumed control so that within a few months the organization, which had started as a cooperative venture, became his personal enterprise.

A number of individuals worked as members of the Family at one time or another. Ten members testified at the trial laying out the structure and operation of the organization and the methods employed by it to control the drug traffic in Gary.

During its course of operation, the Family distributed between one and two thousand capsules of heroin a day. Two witnesses whose primary function in the Family was cutting the heroin, testified that Jeffers obtained the undiluted heroin which was then cut (one ounce of heroin often making as many as 1,300 capsules) and passed on to the street distributors who worked for the Family. During 1972, the Family charged five dollars on the street for a capsule of heroin. In 1973, the price increased to ten dollars. Out of that price, the pusher got twenty percent and remitted the rest to the Family. From these sales (after commissions) the Family took in about $5,000 per day.

To get and retain its exclusive control over the drug traffic in Gary, the Family robbed other drug distributors of their drugs and money. If an independent drug dealer

wanted to remain in business, he had to pay tribute to the Family. One independent dealer testified that he paid the Family four or five hundred dollars per day for the better part of a year to be allowed to deal in drugs in Gary.

Jeffers was installed, at first, as treasurer of the Family because he was the only non-addict in the group. This, however, appeared to be a tactical mistake because within a short period the money that the Family took in through extortion, robbery and drug sales became the sole property of the defendant. Jeffers gave the rest of the Family members salaries for their efforts except the street workers who were paid by commissions. The enforcers and other middlemen were paid at first $100 per week and later $200 per week. Isaac Davis testified that in 1972 twelve members received $100 per week and in 1973 fourteen or fifteen received $200 per week. The members who cut the heroin and controlled the distribution process were paid $500 per week. Willie J. Williams, who had been a cutter for the Family, received $1,000 per week when he took over a large part of the management of the organization. Williams testified that he was present on two occasions when the defendant purchased an automobile for a member of the Family and also testified that Jeffers paid rent on at least two dwellings in which members of the Family lived. Isaac Davis similarly testified that Jeffers bought cars for members of the Family and paid their rent.

Beyond paying Family members, Jeffers exercised strong control over the group. He issued severe beatings to Family members who "messed up." On two occasions, he shot members of the Family for disciplinary purposes. On one occasion, he had been beating a number of Family members and was evidently "wore out." So instead of

issuing the final member a beating, Jeffers made him lie on the floor and then walked over and shot him in the leg.[1] On the other occasion, Isaac Davis related that he, Jeffers and a street worker for the Family went over to James Berry's house to straighten out some complaints Berry had been making about not receiving a fair share of the money. They got Berry out of bed, took him next door and shot him five times in the leg. He was then taken to a hospital.

The defendant profited handsomely from the business. Several witnesses testified that the Family took in about $5,000 per day (exclusive of street commissions). Williams testified that Jeffers received around $25,000 per week in net profits from drug sales alone. This figure would occasionally dip below $20,000, and would at times rise to $50,000 per week. Other income was coming in through extortion and robbery. Jeffers bought a $37,000 house, more than $2,000 in clothes, $4,200 in furniture, a $900 pool table, several cars for the Family members, paid rent on Family dwellings and kept up a substantial payroll. In 1973, Jeffers paid more than $21,000 in legal fees. Taking an extremely conservative estimate that Jeffers made a net income of $10,000 per week over the two-year and two-month period during which the Family operated, Jeffers' income for the entire period totals over a million dollars.

The trial at which this evidence was presented lasted seven days. The government produced more than thirty witnesses who testified to all aspects of the Family's operation and to elements of Jeffers' income. The jury

[1] This particular incident was disputed by the defendant, as the defense called Paul Griffin, the purported victim, to the stand and Griffin testified that he had never been shot by Jeffers.

deliberated for thirty minutes before finding the defendant guilty as charged in the indictment. Garland Jeffers was sentenced to life imprisonment to be served consecutively with his 15 years sentence for conspiring to distribute heroin and cocaine.

II

We turn first to the question of whether Jeffers' conviction for engaging in a continuing criminal enterprise is barred by a prior conspiracy conviction involving the same events.

A

On March 18, 1974, Garland Jeffers and nine others were indicted in the Northern District of Indiana for violations of 21 U.S.C. § 846, conspiracy to distribute heroin and cocaine. The indictment alleged that "[f]rom on or about November 1, 1971 . . . to and including the date of this indictment . . . the defendants . . . did unlawfully, knowingly and wilfully conspire, combine, confederate and agree . . . to distribute heroin . . . and to distribute cocaine. . . ." The indictment further alleged that the conspiracy was to be accomplished by operating "an organization known as the "Family,'" and that "[t]he purpose of 'The Family' organization was to . . . control the traffic in heroin and cocaine in and around the city of Gary, Indiana." A trial was held on this indictment and on June 26, 1974 Garland Jeffers and six others were found guilty of conspiracy to distribute narcotics as charged in the indictment. We affirmed that conviction in *United States* v. *Jeffers,* 520 F.2d 1256 (7th Cir. 1975).

On the same day that the conspiracy indictment was handed down, the indictment charging Garland Jeffers

with violations of 21 U.S.C. § 848, engaging in a continuing criminal enterprise, was also handed down. This indictment alleged that "[o]n or about the 1st day of November 1971, . . . and continuing to the date of this indictment . . . Garland Jeffers . . . did engage in continuing criminal enterprise in that he did distribute and possess with intent to distribute heroin, . . . and cocaine, . . . and undertook such distribution in concert with five or more other people in respect to whom he occupied a position of organizer, supervisor and manager and further as a result of such distribution and other activity obtained substantial income in violation of Section 848, Title 21 of the United States Code." Thus, the indictments cover the same time period and, as seen from the evidence adduced at the continuing criminal enterprise trial, involve the same narcotics distribution ring.

The government attempted to consolidat the trial on the criminal enterprise charge with the conspiracy trial. The defendants in the conspiracy trial, including Garland Jeffers, objected strenuously to the consolidation on a number of grounds, focusing primarily on the contentions that conspiracy and continuing criminal enterprise were not "the same" and that great prejudice would result to Garland Jeffers in the criminal enterprise charge by bringing in evidence as to co-conspirators in the conspiracy which did not directly inculpate Garland Jeffers. The trial court held that the trials could not be joined.

Prior to trial on the continuing criminal enterprise charge (but after the conspiracy trial) Garland Jeffers filed a motion to dismiss the criminal enterprise indictment on double jeopardy grounds. The trial court denied

the motion and a trial was held. On March 26, 1975, the jury returned the guilty verdict.

B

The basis for all double jeopardy claims resides in the Fifth Amendment guarantee that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The defendant contends on appeal that conspiracy and continuing criminal enterprise are "the same offense" for double jeopardy purposes. The defendant argues that the crime of conspiracy charged in the first indictment was a lesser included offense of the crime of engaging in a continuing criminal enterprise, and that as such the offenses are considered the same under the double jeopardy clause.

The Supreme Court has written that a lesser included offense must "be included within but not, on the facts of the case, be completely encompassed by the greater [and that] the . . . greater offense requires . . . a disputed factual element which is not required for conviction of the lesser included offense." *Sansone* v. *United States,* 380 U.S. 343, 350 (1965). Thus, all the elements of the offense must be included within the greater so that proof of the greater necessarily proves the lesser. *James* v. *United States,* 238 F.2d 681, 683 (9th Cir. 1956), *Government of the Virgin Islands* v. *Carmona,* 422 F.2d 95, 100 (3d Cir. 1970).

Conspiracy to distribute narcotics falls within the definition of a lesser included offense of continuing criminal enterprise. The elements of a continuing criminal enterprise include, inter alia, that the accused engaged in a continuing series of violations of the Controlled Substances Act which are understaken *in concert* with five or more other persons with respect to whom the accused

occupies some supervisory position.[2] Since a criminal enterprise charge requires proof that the accused acted in concert with five or more persons, it requires proof of a conspiracy. The proof at the criminal enterprise trial that Garland Jeffers in concert with five or more individuals engaged in a continuing series of violations of the Controlled Substances Act, necessarily proved that Garland Jeffers had engaged in a drug conspiracy as charged in the first indictment. Thus, the conspiracy charge under the standard definition is a lesser included offense of the continuing criminal enterprise charge.

Since 1911, the Supreme Court has held that conviction of what we now call a lesser included offense, bars subsequent prosecution for the greater offense. In *Gavieres* v. *United States,* 220 U.S. 338 (1911), the Court was asked

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[2] Section 848(b) of Title 21 provides:

. . . a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this title or title III the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this title or title III—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Section 846 of Title 21 provides:

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Although § 848 applies as well to violations of Title III (the Controlled Substances Import and Export Act) while § 846 does not, there was no question in this case but that the violations charged were of the Controlled Substances Act (referred to as "this Title" in both sections).

to overturn Gavieres' conviction for insulting a public officer on the grounds that it was barred by the petitioner's prior conviction for drunkenness in public arising from the same acts. The Court saw the question as one of defining the scope to be given to the guarantee against being twice placed in jeopardy.

> It is to be observed that the protection intended and specifically given is against second jeopardy for the *same offense.* The question, therefore, is, Are the offenses charged . . . identical.

Id. at 341-42. The Court answered this question by taking the view propounded by Judge Gray of the Supreme Judicial Court of Massachusetts in *Morey* v. *Commonwealth,* 108 Mass. 408 (1871). Judge Gray wrote:

> A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Id. at 434, quoted at 220 U.S. at 342. By this test, a lesser included offense and its greater offense will always be considered the same for double jeopardy purposes since the elements of the lesser offense are always included within the greater and thus, proof of the greater would be sufficient to warrant a conviction on the lesser.

The *Gavieres* test has continuing vitality as it was relied upon in *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932). In *Blockburger* the Court had to decide

whether the petitioner who was convicted of two offenses arising out of the same acts could be sentenced to serve consecutive terms for the offenses. The issue was resolved in double jeopardy terms in that the Court saw the question as "whether, both sections being violated by the same act, the accused committed two offenses or only one." *Id.* The Court resolved the question by relying upon the *Gavieres* formulation. It wrote:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Gavieres* v. *United States,* 220 U.S. 338, 342. (*Id.*)

The *Gavieres* test basically holds that conviction of the greater or lesser offense, bars prosecution for another included offense. *Blockburger* extended this by holding that a person could only be punished for one of a series of included offenses, even though he may have been convicted of all the offenses at the same trial.[3]

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[3] These rules appear to be underlying assumptions of present thinking on the double jeopardy issue. For instance, in *Waller* v. *Florida,* 397 U.S. 387, 390 (1970), the Court acted "on the assumption that the ordinance violations were included offenses of the felony charge" and reversed the state felony prosecution because of the prior municipal prosecution on the ordinance charge holding that the dual sovereignty theory did not apply to state and municipal governments. Similarly, in *Robinson* v. *Neil,* 409 U.S. 505 (1973), which held *Waller* v. *Florida* retroactive, the Court remanded the habeas corpus action for a determination of whether in fact the offenses of which the prisoner was convicted were the same. The district court, in *Robinson* v. *Neil,* 366 F. Supp. 924, 929 (E.D. Tenn. 1973), held that since the parties had stipulated that the municipal offense was a lesser included offense of that charged in the

C

In the recent case of *Iannelli* v. *United States,* 420 U.S. 770 (1975), the Supreme Court seems to have formed a new double jeopardy approach towards complex statutory crimes. In *Iannelli* eight defendants were each convicted on basically the same facts both of running an illegal gambling business in violation of 18 U.S.C. § 1955 and of conspiracy to run such a business, 18 U.S.C. § 371. The petitioners challenged their convictions and sentences claiming that the conspiracy charge should have merged with the substantive offense under Wharton's Rule and that punishment on both offenses violated the fifth amendment guarantee against double jeopardy. The Court upheld their convictions and sentences relying on a perceived congressional intention to retain each offense as an "independent curb" in the war against organized crime. 420 U.S. at 791. The double jeopardy contention was passed over in a footnote, *id.* at 785 n. 17, and the theme of the opinion seems to be that at least in the area of complex statutory crimes, if Congress intends that two offenses be retained as independent offenses, prosecution under both is permissible.

The elements required to prove a § 1955 violation include: 1) conducting, managing, supervising, a gambling business which is in violation of state law, 2) which "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business," 3) and which remains in substantially continuous opera-

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(Footnote continued)
subsequent state prosecution, the state conviction was barred on double jeopardy grounds. Applying this to the present situation, the result seems to be that Garland Jeffers' conviction for engaging in a continuing criminal enterprise must be reversed. However, we are not convinced that this rather mechanical analysis should control the disposition of the case.

tion in excess of thirty days or has gross revenue of $2000 in any single day.[4] The requirement that the business involve five or more persons in supervisory positions clearly constitutes a requirement for some sort of concerted activity. If five or more persons own, manage or supervise a business, they certainly have an agreement, either explicit or tacit to operate the business, and have joined in a conspiracy for that purpose.[5]

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[4] 18 U.S.C. § 1955 reads in relevant part:

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, book-making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein. . . .

[5] See *United States* v. *Cortwright,* ..... F.2d ..... (7th Cir. Nos. 75-1246-1250, December 9, 1975, slip opinion at 2), where we noted that "Conspiracy in its broadest definition 'is a partnership in criminal purposes,'" quoting *United States* v. *Kissel,* 218 U.S. 601, 608 (1910). Five or more people running an illegal business would fall within that definition. We also noted in *Cortwright, id.* at ..... (slip opinion at 3) that "[i]n a conspiracy . . . '[t]he formalities of an agreement are not necessary and are usually lacking,'" quoting *United States* v. *Varelli,* 407 F.2d 735, 741 (7th Cir. 1969). Therefore, it cannot be questioned that § 1955, at least tacitly requires proof of a conspiracy.

The only element required to prove a conspiracy under 18 U.S.C. § 371 to violate § 1955 is an agreement to run an illegal gambling business (and an overt act in furtherance of the agreement). This requirement of concerted activity is also an element of § 1955. By a traditional analysis, then, the conspiracy charge is a lesser included offense of a substantive charge under § 1955. If it is proven that a person managed, supervised or directed, along with five other people an illegal gambling business, certainly, it has also been proven that he conspired to run an illegal gambling business.[6]

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[6] The Court in *Iannelli* tries to make an argument that § 1955 and conspiracy to violate § 1955 require different elements for conviction for each offense. Certainly, as the Court points out, 420 U.S. 785 n.17, the statutory definition of the § 1955 offense does not explicitly contain the required element of agreement. However, it is difficult to imagine how one can prove that five or more people managed a gambling business without also having proved that they operated under an agreement to do just that. As Justice Douglas wrote in his dissent to *Ianelli:*

> The evidence established, in the Government's view, "syndicated gambling," the kind of activity proscribed by § 1955. The very same evidence was relied upon to establish the conspiracy—a conspiracy, apparently, enduring as long as the substantive offense continued, and provable by the same acts that established the violation of § 1955. Thus the very same transactions among the defendants gave rise to criminal liability under both statutes.

420 U.S. at 792. The Court itself even recognizes that there is a "concerted activity" requirement in § 1955, but says the only purpose of this element was to limit federal prosecutions to large scale gambling activities. *Id.,* at 790. Similarly, the Court seems to agree with Justice Douglas' conclusion that the same evidence which proves a § 1955 violation can also prove a conspiracy violation when it notes that prosecutors should not always seek conviction under both § 1955 and the conspiracy statute, but should use their discretion in prosecuting under one statute or another. *Id.,* at 791.

Under the traditional analysis of *Blockburger* v. *United States,* 284 U.S. 299 (1932), punishment could not be imposed for two offenses, one of which contains all the elements of the other (i.e., for both the lesser included offense and the greater). The Court in *Iannelli,* however, characterizes *Blockburger* as a tool for statutory interpretation rather than a double jeopardy decision by suggesting that it "serves a . . . function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction." 420 U.S. at 785 n. 17. The focus of *Blockburger* which centered on whether two offenses were "the same" to determine whether the imposition of sentences on both offenses constituted double punishment, has been shifted by the characterization given it in the *Iannelli opinion.* Thus, the focus to determine if two offenses are "the same" for double jeopardy purposes, at least in regard to complex statutory crimes, now appears to center on the congressional intent with regard to such crimes. The Court in *Iannelli* in dealing with the application of Wharton's Rule to the situation there, wrote:

> [A]s the Rule is essentially an aid to the determination of legislative intent, it must defer to a discernible legislative judgment.

Id., at 786. And concluded:

> We think it evident that Congress intended to retain each offense as an "independent curb" available for use in the strategy against organized crime.

Id., at 791.

For offenses derived from the common law and for simple statutory crimes, the *Gavieres-Blockburger* tests provide an important safeguard and serve a useful function. For instance, with regard to the numerous degrees

of homicide from first-degree murder down through manslaughter and reckless homicide, the reason that the different degrees exist is not so that numerous convictions can be obtained against one defendant, but so that for one homicide, the proper degree of censure and punishment can be meted out. It would be totally improper for society after it had chosen the proper degree of censure and punishment for an individual, for instance by conviction for manslaughter, then to try and obtain a higher degree by prosecuting the individual for first-degree murder. Society has made its choice with regard to characterizing the homicide committed by the defendant, and should not be allowed to change it.

In regard to highly complex statutory crimes, however, the included offense tests are often not appropriate to determine whether two offenses should be classed as "the same," because often, even though these offenses meet the included offense test, they are directed at quite different results. For instance, in the present case, conspiracy and continuing criminal enterprise are aimed at punishing different things. Conspiracy is aimed at the evil of collective criminal agreement, and seeks to attack problems quite apart from the evil of the underlying offense, for as noted in *Callanan* v. *United States,* 364 U.S. 587, 593 (1961), "[c]oncerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality."

The crime of engaging in a continuing criminal enterprise is aimed at something much different than just punishing concerted drug violations. Congress first included continuing criminal enterprise in the Drug Control Act, not as an independent crime, but as a sentencing

alternative, the purpose being to severely punish those criminals who made a substantial living by violating the drug laws.[7] For procedural and constitutional reasons,[8] the original proposal was changed to create an inde-

[7] In its original form, the continuing criminal activity part of the Drug Control Act resembled in procedure and effect the dangerous special offender provision enacted as 18 U.S.C. § 3575. In the additional views appended to H.R. REP. No. 1444, 91st Cong., 2nd Sess. (1970) (to accompany H.R. 18583), 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4649, the operation of the original provision was described in this way:

> In . . . H.R. 18583 in its original form, the prosecuting attorney is called upon, in order to institute the special sentencing procedures, to file with the court an instrument specifying that the defendant falls in the category of a special offender, in which case special procedures are provided for sentencing.
>
> [The bill provides] for a hearing before sentencing wherein the defendant is permitted the ordinary representation and process, except that he is to be afforded only "the substance of such parts of the presentence report as the court intends to rely upon" and this only if there are not "placed in the record compelling reasons for withholding particular information."

[8] As is pointed out in the additional views to H.R. REP. No. 1444, 91st Cong., 2nd Sess. (1970) (to accompany H.R. 18583), 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4650-51, the original version withheld much information from the defendant, allowed the use of hearsay evidence in the sentencing proceeding, and assumed that any substantial income or resources in the defendant's name or under his control were derived from unlawful activities unless the defendant proved otherwise. All these factors appeared to the committee to be of questional constitutional validity. So, "[i]nstead of providing a post-conviction-presentencing procedure, [the committee] made engagement in a continuing criminal enterprise a new and distinct offense with all its elements triable in court." *Id.* at 4651.

pendent crime. However, the purpose of the provision did not change. The purpose, to punish and take out of circulation persons who are engaged in the manufacture and sale of drugs primarily for the profits to be derived therefrom, is evident in both the provision itself, and the legislative history. The provision, 21 U.S.C. § 848(b)(2)(B), requires as proof of engaging in a continuing criminal enterprise that the defendant be shown to have derived substantial profits from the enterprise. As part of the penalty provision, it allows imposition of large fines ($100,000), 21 U.S.C. § 848(a)(1), and permits forfeiture of all profits from the enterprise along with any interest, or any claim in any property or contractual rights in the enterprise. 21 U.S.C. § 848(a)(2). The House Committee Report which accompanied the bill spoke of providing "severe criminal penalties for persons engaged in illicit manufacture or sale of controlled drugs *primarily for the profits to be derived therefrom.*" H.R. REP. No. 1444, 91st Cong., 2nd Sess. (1970) (to accompany H.R. 18583), 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4575. The report also noted that the continuing enterprise provision "is intended to serve as a strong deterrent to those who otherwise might wish to engage in the illicit traffic, while also providing a means for keeping those found guilty of violations out of circulation." *Id.* at 4576. The difference between conviction for engaging in a continuing criminal enterprise and engaging in a conspiracy to violate the drug laws is not just one of the degree of censure and punishment to be meted out for one's viola-

tion of the drug laws.[9] It is a difference in character and purpose. From erading the legislative history, we conclude that Congress did not intend that continuing criminal enterprise be just another degree of conspiracy, but intended that it be a substantially separate crime, an independent weapon in the government's arsenal in the war on illicit drugs.[10]

From this analysis, then, we conclude that the conspiracy charged in the first indictment and the continuing

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[9] The Court in *Iannelli* wrote:

> Nor do we find merit to the argument that the congressional requirement of participation of "five or more persons" as an element of the substantive offense under § 1955 represents a legislative attempt to merge the conspiracy and the substantive offense into a single crime. The history of the Act instead reveals that this requirement was designed to restrict federal intervention to cases in which federal interests are substantially implicated.

420 U.S. at 789. Similarly, the congressional requirement that the participation of "five or more persons" must be shown to prove a continuing criminal enterprise charge seems only to be an attempt to restrict the harsh sanctions of the provision to those who are engaged in a large-scale on-going business in narcotics. If Congress had wanted to merge continuing criminal enterprise and conspiracy, it could have spoken distinctly to that point.

[10] As the Court in *Iannelli* noted:

> The historical difference between the conspiracy and its end has led this Court consistently to attribute to Congress "a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different; a distinction whose practical importance in the criminal law is not easily over-estimated."

420 U.S. at 779, quoting *Callanan* v. *United States*, 364 U.S. 587, 594 (1961).

criminal enterprise charged in the second indictment were not the "same offense" for double jeopardy purposes,[11] and a prior conviction on the first indictment did not bar prosecution on the second.[12]

III

Prior to trial, the defendant made a verified motion for change of judge in accordance with 28 U.S.C. § 144. The defendant contended that since Judge Sharp had already sat at numerous trials concerning the exploits of the Family, and since the judge had presided at the defendant's prior conspiracy trial, the judge was prejudiced against the defendant and was required to recuse himself. Judge Sharp denied the motion and presided at the trial.

A judge when presented with a timely motion under § 144 must recuse himself if the motion alleges facts sufficient to show judicial bias even though he may know them to be entirely false. *Berger* v. *United States*, 255

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[11] This conclusion similarly takes care of defendant's claim that the consecutive sentences constitute double punishment under the double jeopardy clause of the constitution.

[12] This result appears sensible especially in light of the fact that the Court refuses to accept the "same transaction" theory of double jeopardy espoused by Justices Douglas, Brennan and Marshall. See Justice Brennan's concurring opinion in *Ashe* v. *Swenson*, 397 U.S. 436, 448-460 (1970). See also *Robinson* v. *Neil*, 409 U.S. 505, 511 (1975) (Brennan, J. concurring), and *Harris* v. *Washington*, 404 U.S. 55, 57 (1971) (separate statement of Justices Douglas, Brennan and Marshall). The included offense theories, if applied to complex statutory crimes, create hypertechnical classifications for offenses, which catch prosecutors off guard by holding offenses which would not normally be considered similar "the same."

U.S. 22 (1921). The judge may not judge the verity of the facts presented, but must judge their sufficiency. *Hodgson* v. *Local 2, Distillery Workers,* 444 F.2d 1344, 1348 (2nd Cir. 1971). The two basic facts presented by the defendant's motion are 1) that Judge Sharp had presided and would preside over numerous trials concerning alleged Family members, and 2) that Judge Sharp presided at the defendant's prior trial. The defendant alleged no facts which directly showed Judge Sharp's bias, but relied only on the inference that the intimate connection with the defendant's prior trial and other Family trials would create bias.

We have dispatched this type of claim before. In *United States* v. *Dichiarinte,* 445 F.2d 126, 132 (7th Cir. 1971), Judge Swygert wrote:

> The fact that the judge might have formed an opinion concerning the guilt or innocence of the defendant from the evidence presented at an earlier trial involving the same person is not the kind of bias or prejudice which requires disqualification.

Accord, Wolfson v. *Palmieri,* 396 F.2d 121 (2nd Cir. 1968). Similarly, "inferences drawn from prior judicial determinations are insufficient grounds for recusal because it is the duty of the judge to rule upon issues of fact and law and questions of conduct which happen to form a part of the proceedings before him." *United States* v. *Partino,* 312 F. Supp. 1355, 1358 (E.D.La. 1970). In the Watergate conspiracy trial of Mitchell, Ehrlichman, Colson and others, several defendants moved for the recusal of Chief Judge Sirica, because of his involvement in so many aspects of the Watergate indictments and prosecutions. In a lengthy and well-written opinion, Judge

Sirica denied recusal on the ground that the allegations showed only prior judicial actions, and that no "personal" as opposed to "judicial" bias had been alleged. *United States* v. *Mitchell,* 377 F. Supp. 1312, 1320 (D.D.C. 1974). As Judge Sirica noted *id.* at 1316, citing *Beland* v. *United States,* 117 F.2d 958, 960 (5th Cir.), *cert. denied,* 313 U.S. 585 (1941), "[t]he judge is presumed impartial." All the defendant alleged in this case was prior judicial actions on the part of Judge Sharp. If from these we infer that Judge Sharp developed personal bias towards the defendant, we are overlooking the basic presumption that a judge approaches each new case with impartiality and conducts the case on its own merits from the evidence there presented quite apart from any other case he might have heard. If the rule were otherwise, the Family would long ago have run through the judges in Indiana and possibly in all of the Seventh Circuit.

IV

Prior to trial, the defendant moved to dismiss the continuing criminal enterprise indictment on the grounds that the indictment was insufficient, because it failed to state an essential element of the crime—that violation of the federal drug laws was part of "a continuing series of violations." We have recently held that when an indictment fails to allege an essential element of the offense sought to be charged the indictment is insufficient as a matter of law. See the opinion of Judge Castle in *United States* v. *Wabaunsee,* ..... F.2d ..... (7th Cir. Nos. 75-1004 and -1005, December 30, 1975, slip opinion at 6). Judge Castle, however, noted in the *Webaunsee* opinion that the exact wording of the required element need not be present if "words of similar import" supply the required element. *Id.* at ..... (slip opinion at 3), citing *United States* v. *Airdo,* 380 F.2d 103, 105 (7th Cir.), *cert. denied,* 383 U.S. 913 (1967). The *Airdo* case noted that:

> The test of sufficiency is whether [the indictment] informs the defendant of what charges he must meet and protects him against double jeopardy.

380 F.2d at 104. In the *Wabaunsee* case, in a prosecution for transporting stolen goods across state lines, the indictment failed to allege the element of knowledge as to whether the goods were stolen. In the *Airdo* case, the element of knowledge was similarly absent in an indictment charging the defendant with unlawful possession of goods stolen from interstate commerce. However, the *Airdo* indictment contained the phrase that the defendant "did unlawfully buy, receive and have in his possession" a television set. The court held that in that context the word unlawfully supplied the required element of knowledge because "[p]ossession of a television set recently stolen from an interstate shipment could be 'unlawful' . . . only if the possession were accompanied by knowledge that the set had been stolen." *Id.* at 105.

In the present case, the defendant, asserts that the indictment failed to allege that violation of the federal drug laws was "a part of a continuing series of violations" as required by 21 U.S.C. § 848(b)(2). The indictment reads, in relevant part:

> On or about the 1st day of November 1971, . . . and continuing to the date of this indictment, . . . GARLAND JEFFERS . . . did engage in [a] continuing criminal enterprise in that he did distribute and possess with intent to distribute heroin, . . . in violation of Title 21 United States Code, Section 841(a)(1), a felony, and cocaine, . . . in violation of Title 21 United States Code, Sectioin 841(a)(1), a felony. . . .

This indictment lays out four substantive offenses, distribution and possession with intent to distribute both

heroin and cocaine. It relates that the defendant "did engage" in these offenses from "on or about "November 1, 1971 and "*continuing* to the date of this indictment." From this it can only be inferred that the indictment charges a continuing series of violations, and that the indictment was sufficient to apprise the defendant of what charges he must meet.[13]

About two weeks prior to trial, the defendant filed motions for a bill of particulars and additional discovery, directed primarily at the substantial income element of the indictment. The trial court denied these motions, after the prosecution had advised both the court and the defendant that proof on the element of "substantial income" would come in two forms: 1) money given defendant and seen in his possession, and 2) by proof of specific expenditures which when added together would constitute a substantial amount of money. The defendant contends that the trial court abused its discretion in denying the motions.

A motion for bill of particulars under Rule 7(f), FED. R. CRIM. P., is directed to the sound discretion of the trial court even under the liberalized 1966 amendments to that rule.[14] In *United States* v. *Holovachka,* 314 F.2d

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[13] Also, the name of the crime itself, "continuing criminal enterprise", apprises the defendant to some extent that the government is charging a continuing series of violations.

[14] We agree with the Third Circuit when it noted that:

> . . . the amendment was intended to liberalize the court's attitude towards bills of particulars. . . . However, the Committee, as well as the federal courts, have made clear that amended Rule 7(f) leaves undisturbed the discretionary nature of the granting of a bill of particulars.

United States v. *Conway,* 415 F.2d 158, 161 (3rd Cir. 1969), *cert. denied,* 379 U.S. 994 (1970).

345, 349 (7th Cir. 1963), we held that in a tax evasion case denial of a bill of particulars was not an abuse of discretion, when in response to such motion the government informed the defendant that "it proposed to prove his correct taxable income . . . for each year . . . by net worth plus non-deductible expenditure method of proof." In light of the fact that in this case the government disclosed exactly the same material, (i.e., its theory of the case) plus a great deal of other material, we cannot say the denial of the motion constituted an abuse ofdiscretion.[15]

VI

The defendant cites a number of alleged errors concerning the admission of evidence, and suggests that these

[15] In his final contention regarding matters prior to the taking of evidence, the defendant claims that the voir dire was insufficient in that the trial judge failed to sufficiently question prospective jurors concerning their racial prejudices. The defendant admits that the court asked the general question "would the color of a man's skin affect your decision?" This question alone, however, is sufficient to meet standards set forth in *Ham* v. *South Carolina,* 409 U.S. 524 (1973). There the court held that a trial judge must question prospective jurors on the issue of racial prejudice, but that the judge "was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner." *Id.* at 527. Moreover, we note that *Ham* did not announce a constitutional requirement applicable to all criminal cases, but only those which exhibited the unusual circumstances present in *Ham. Ristaino* v. *Ross.* 44 U.S.L.W. 4305 (March 3, 1976). Such circumstances are not present in this case. Furthermore, the petitioner failed to make timely objections or to request additional voir dire. Hence, we cannot say the failure to further question jurors on the subject was plain error.

require reversal of his conviction.[16] The only substantial

[16] The defendant contends that on the issue of substantial income, he should have been allowed to present in evidence the fact that his lawyer in the trial was court appointed. This request was denied for the obvious reason, that the fact is not relevant to the question of substantial income. Jeffers fired his former lawyers prior to trial and refused to secure other counsel. Finally, the court was required to appoint counsel so that the trial could proceed. Clearly, counsel was not appointed because of Jeffers' poverty, as the trial court assessed the cost of counsel against Jeffers at the end of trial.

The defendant also urges that a prior statement that he had given to two federal agents should have been suppressed. This statement was admitted at the prior conspiracy trial over defendant's objections and we affirmed its use there. *United States* v. *Jeffers,* 520 F.2d 1256, 1268 (7th Cir. 1975). The trial court in the present case held a new evidentiary hearing on the question and came to the same conclusion as had the court in the previous case. We cannot on this new record find any more ground for error than on the old record. The admission of the statement was proper.

Jeffers also contends that false testimony was admitted on the issue of attorney's fees. The testimony, however, was admitted on cross-examination; it was not direct testimony, but only hearsay (as the witness admitted she had only "heard" that the Family paid $4,000,000 in attorney's fees); and came in while the defense was trying to test the credibility of the witness by reading the witness' prior statements. If there was any prejudice from the admission of this testimony (which is doubtful), it was counsel's fault. Neither the prosecutor nor the court had anything to do with its admission.

Finally, the defendant contends that the court committed prejudicial error in not allowing the jury to see three witnesses called by the defense refuse to testify on fifth amendment grounds. The defendant suggests that "the offer of the lack of testimony of three individuals who were repeatedly named as leaders in the 'Family' was intended to show that Jeffers had done everything he could to get testimony." As helpful as it might have been for the jury to see these witnesses "take the fifth" (and it certainly is doubtful what help if any this could be), the impropriety of having the jury exposed to such suggestive non-testimony overrides any possible benefit. The trial court did not abuse its discretion in refusing to allow these witnesses before the jury.

contention in this group relates to whether the compelled testimony of the defendant's former attorney in regard to the amount of attorney's fees paid by the defendant in 1973 violated his attorney-client privilege. At the outset, we note that this information was clearly relevant to the issue of substantial income under the government's theory of gross expenditures.

Dean Wigmore in his classic treatise on evidence laid down the fundamental policy behind the attorney-client privilege:

> In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent.

8 WIGMORE ON EVIDENCE § 2291 (McNaughton rev. 1961). In regard to the disclosure of the amount of attorney's fees paid by a client, the crucial question is whether such disclosure violates the substance of a confidential communication between attorney and client. The government called the defendant's former attorney for the sole purpose of establishing an element of the defendant's expenditures in the year 1973. This violated no confidential communication in the attorney-client relationship. Like any other expenditure, attorney's fees are a legitimate subject to inquiry, unless other factors are present which make an answer to such an inquiry a disclosure of a fundamental communication in the relationship. The testimony here, however, elicited no more than would have been elicited by introducing evidence that the defendant had bought a Rolls-Royce for cash (i.e., a substantial expenditure).

The case law on the question is in concurrence. The Second Circuit has noted that:

> [I]n the absence of allegations as to special circumstances—we see no reason why an attorney should be any less subject to questioning about fees received from a taxpayer than should any other person who has dealt with the taxpayer. There is no further encroachment here upon any confidential relationship than there is in questioning about the existence or date of the relationship. *In re Wasserman,* 198 F. Supp. 564 (D.D.C. 1961). All these matters are quite separate and apart from the substance of anything that the client may have revealed to the attorney.

Colton v. *United States,* 306 F.2d 633, 637-38 (2nd Cir. 1962). Similarly in *United States* v. *Pape,* 144 F.2d 778, 782 (2nd Cir.), *cert. denied* 323 P.C. 752 (1944), that court noted:

> The authorities are substantially uniform against any privilege as applied to the fact of retainer or identity of the client. The privilege is limited to confidential communications, and *a retainer is not a confidential communication,* although it cannot come into existence without some communication between the attorney and the—at that stage prospective—client. (Emphasis added.)

Accord, In re Semel, 411 F.2d 195 (3rd Cir. 1969), *Wirtz* v. *Fowler,* 372 F.2d 315, 332 (5th Cir. 1966).

Cases like *In re Grand Jury Proceedings,* 517 F.2d 666 (5th Cir. 1975), *Tillotson* v. *Broughner,* 350 F.2d 663 (7th Cir. 1965) and *Baird* v. *Koerner,* 279 F.2d 623 (9th Cir. 1960), which uphold the privilege under similar requests for information have special circumstances present which make them inapplicable to the situation here. As the Fourth Circuit explained in *NLRB* v. *Harvey,* 349 F. 2d 900, 905 (4th Cir. 1965):

> The privilege may be recognized when so much of the actual communication has already been disclosed

> [not necessarily by the attorney, but by independent sources as well] that identification of the client [or of fees paid] amounts to disclosure of a confidential communication.

In *Tillotson, Baird* and *In re Grand Jury Proceedings,* so much of the actual communication had already been established, that to disclose the client's name would disclose the essence of a confidential communication, because it would provide "links in an existing chain of inculpatory events or transactions." *In re Grand Jury Proceedings,* 517 F.2d at 674. No such circumstances are present here. The testimony of Jeffers' former attorney was properly admitted into evidence.

VII

The defendant claims that the trial court made a number of errors with regard to the instructions given at trial. Of these, only one appears worthy of lengthy discussion.[17] This claim concerns the definitions of "substantial income" in the continuing criminal enterprise provision.

The instruction given at trial read, in pertinent part, as follows:

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[17] The conspiracy instructions of which the defendant complains were properly given as going to the element of a continuing series of violations and, if improper, they can only be classed as harmless error, since proof of the defendant's continuing violations was overwhelming. Similarly, the instructions which defendant claims were contradictory, when read in proper context are neither contradictory nor are they improper. Finally, it was proper for the court to read "or" instead of "and" between "organizer, supervisor or any other position of management" as the statute does not require the conjunctive and, although the indictment reads "and," this does not have to be followed in the instructions. *Price* v. *United States,* 150 F.2d 283, 285 (5th Cir. 1945).

> Finally, I instruct you that the word "income" here can be simply defined as money or other material resources or property received or gained directly from illegal narcotics transactions by the defendant in question.
>
> Incidentally, I instruct you also that *it does not necessarily mean net income.* That is to say, *it could mean gross receipts or gross income.*
>
> From what I have already said, ladies and gentlemen of the jury, it would follow that the phrase "substantial income" in this kind of a charge should be construed as far as possible in an objective manner. That is to say, in order to support a conviction under this charge, you should find that Garland Jeffers received what any reasonable person would consider to be considerable or ample funds from engaging in a continuing activity of distributing heroin as an organizer or supervisor or manager. (Emphasis added.)

The defendant objects to the trial court's characterization of "income" as "not necessarily . . . net income" but possibly "gross receipts or gross income." He claims that this is inconsistent with the clear meaning of the word "income" as used in the statute and calls our attention to numerous tax cases which define income as net income.

The statute provides that a person only engages in a continuing criminal enterprise when, in conjunction with meeting all the other requirements, he "obtains substantial income or resources" from the enterprise. 21 U.S.C. § 848 (b)(2)(B). Nothing else in the statute provides aid in determining how "substantial income" should be characterized, whether it should be "net" or "gross." Nor does the Committee Report on the Act provide assistance. The only passage in the report which deviates from the statutory language in question speaks of "substantial profits"

rather than "substantial income." H.R. REP. No. 1444, 91st Cong., 2nd SESS. (1970) (to accompany H.R. 18583), 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4575.

The continuing criminal enterprise provision was intended "to serve as a strong deterrent to those who otherwise might wish to engage in the illicit [drug] traffic," *id.* at 4576, and consistent with this purpose, it cannot be construed with the strict attention to subtlety of meaning that might be proper for a tax statute. Clearly, when Congress passed the statute it intended that the continuing criminal enterprise section reach those persons who were reaping large profits from illegal drug traffic. This does not mean, however, that Congress intended "substantial income or resources" to be confined only to net income or that proof of substantial income should be confined to proof of net income. In the few cases of prosecutions for violating the continuing criminal enterprise provision, proof of "substantial income" has come in through proof of gross income or gross receipts. For instance in *United States* v. *Sisca,* 503 F.2d 1337, 1346 (2nd Cir. 1974), the court laid out the evidence it relied upon in this fashion:

> [The defendant] admitted that he had purchased [on the morning of his arrest] heroin worth more than $170,000, and that he had been making large purchases and subsequent redistributions on a biweekly basis for a period of some two and one half years.

On the strength of this evidence, the court concluded:

> [The defendant] nevertheless contends that the government failed to prove that he had gained substantial economic benefits from his distribution activities. He says that his December 15 purchase was on "consignment" and that he was $170,000 in debt at the time. This contention is fatuous, to put it charitably. In the first place, we reject any notion that a consignment debt necessarily suggests an operational deficit. On the contrary, in the context of this record, it indicates a substantial anticipated profit. Secondly, in view of his position in the distribution network, the enormous quantity of narcotics involved (over 200 kilograms annually) and the substantial sums of money changing hands ($5,000,000 annually), the jury surely was justified in finding that [the defendant] derived substantial income from this immensely profitable narcotics enterprise.

The proof there consisted solely of gross receipts. In *United States* v. *Manfredi,* 488 F.2d 588 (2nd Cir. 1973), similar proof was used to support the substantial income element.[18] In *Manfredi,* also, the court suggested that the statute was aimed at those who trafficked in heroin where "substantial sums of money chang[ed] hands." *Id.* at 603.

The courts have not taken the "substantial income" requirement as setting some definite amount of profits

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[18] The court wrote:

> [The defendant] was selling heroin and cocaine in a continuing series of weekly transactions. . . . To Horace Marble alone, he sold an estimated one million dollars' worth in 17 months.

Id. at 596. Also, the court in *Manfredi* noted—

> Here, . . . the statute might have been more artfully drawn, but no language has occurred or has been suggested to us that better expresses the congressional purpose. To sustain appellant[s] position [that the statute is unconstitutionally vague] would force us to hold that words cannot be devised to make it an offense to engage in the continuous sale and trafficking in heroin with a number of other people and with substantial sums of money changing hands.

Id. at 603.

that must be proven to obtain a conviction for engaging in a continuing criminal enterprise. Nor do we think this would be a proper interpretation of the statute. The "substantial income" requirement should be interpreted as a guide to the magnitude of the criminal enterprise. Congress did not seek to punish small-time operators under this section. It sought to punish only those who obtained "substantial income or resources" from a continuing series of drug violations. Certainly, this can be established by substantial gross receipts or substantial gross income as in *Sisca* and *Manfredi*. Examined in this light, and keeping in mind the extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits, the definition of income as "gross income or gross receipts" was entirely proper.

VIII

Finally, the defendant contends that the evidence on the issue of substantial income was not sufficient to sustain his conviction. On the question of substantial income, the government produced voluminous evidence. We need only refer to four witnesses.

Isaac Davis testified that Jeffers considered the money made from Family operations as his money. He also testified that for almost half of 1973 he turned over five thousand dollars a day to Jeffers. James Poole testified that from August 1972 through December 1972, similar amounts were turned over to Jeffers. The testimony of Willie J. Williams and Ollie Mae Vinson further supported the fact that huge sums were coming into Jeffers' possession weekly. If, as we noted earlier, we make an extremely conservative estimate that Jeffers netted ten thousand dollars per week, we find that he made over

one million dollars during the duration of the indictment. Certainly, this satisfies the substantial income requirement.

The judgment of conviction is affirmed.

AFFIRMED

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 18, 1976.

Before

Hon. Wilbur F. Pell, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. James B. Parsons, Chief District Judge*

United States of America,

Plaintiff-Appellee,

No. 75-1422 vs.

Garland Jeffers,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

No. H-CR-74-57

Allen Sharp, *Judge*

On consideration of the petition for rehearing filed in the above-entitled cause, all of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for rehearing in the above-entitled cause be, and the same is hereby, Denied.

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* Chief District Judge James B. Parsons of the United States District Court for the Northern District of Illinois is sitting by designation.

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1805

GARLAND JEFFERS,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED JUNE 12, 1976
CERTIORARI GRANTED OCTOBER 4, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1805

GARLAND JEFFERS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX TO APPENDIX

NOTE: The opinion of the United States Court of Appeals for the Seventh Circuit is printed in Appendix A to the Petition for Writ of Certiorari.

The order denying rehearing in the United States Court of Appeals for the Seventh Circuit is printed in Appendix B to the Petition for Writ of Certiorari.

A CHRONOLOGICAL LIST OF IMPORTANT DATES ON WHICH PLEADINGS WERE FILED, HEARINGS HELD AND ORDERS ENTERED

March 18, 1974—Indictment filed in Hammond Criminal 74-56 charging Jeffers and others with conspiracy to distribute heroin; indictment filed in Hammond Criminal 74-57 charging Jeffers with a continuing criminal enterprise.

April 9, 1974—Government filed Motion for trial together in Hammond Criminal 74-56; the Motion requested that the conspiracy and the continuing criminal enterprise charges tried together.

April 29, 1974—Jeffers and other defendants in Hammond Criminal 74-56 filed objections to Government's Motion for trial together and memorandum in support thereof.

April 30, 1974—The trial court held arguments on the government's Motion for Trial Together; docket entered in Hammond Criminal 74-57 to this effect.

May 7, 1974—The trial court denied on the government's motion for trial together.

June, 1974—Jeffers was tried and convicted on the conspiracy charge and was sentenced to fifteen years.

March 5, 1975—Jeffers filed Motion to Dismiss the continuing criminal enterprise indictment because of double jeopardy.

March 10, 1975—Government filed Response to Defendant's Motion to Dismiss indictment.

March 11, 1975—The trial court denied Jeffers' Motion to Dismiss the indictment because of double jeopardy.

March 17, 1975—Jeffers' continuing criminal enterprise trial began.

March 26, 1975—Jeffers convicted of a continuing criminal enterprise

May 9, 1975—Jeffers sentenced to life, fined $100,000. The life sentence to run consecutive with sentence imposed in Hammond Criminal 74-56.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

H CR 74 57

Sec. 848, Title 21 USC

[Filed Mar. 18, 1974, at .....M, Francis T. Grandys, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

v.

GARLAND JEFFERS, AKA PETERMAN

The Grand Jury charges:

On or about the 1st day of November, 1971, the exact date is to the Grand Jury unknown, and continuing to the date of this indictment, in the Northern District of Indiana, and elsewhere, GARLAND JEFFERS, aka PETERMAN, defendant herein, knowingly and unlawfully did engage in continuing criminal enterprise in that he did distribute and possess with intent to distribute heroin, in amounts to the Grand Jury unknown, a Schedule I Narcotic Drug controlled substance in violation of Title 21 United States Code, Section 841(a)(1), a felony, and cocaine, in amounts to the Grand Jury unknown, a Schedule II Narcotic Drug controlled substance, in violation of Title 21 United States Code, Section 841(a)(1), a felony, and undertook such distribution in concert with five or more other people with respect to whom he occupied a position of organizer, supervisor and manager and further as a result of such distribution and other activity obtained substantial in-

come in violation of Section 848, Title 21 of the United States Code.

A TRUE BILL

/s/ Donald G. Eldridge
Foreman

/s/ John R. Wilks
JOHN R. WILKS
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

H-CR-74-56

Sec. 846, Title 21, United States Code

[Filed Mar. 18, 1974, At ____M, Francis T. Grandys, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

v.

GARLAND JEFFERS A/K/A PETERMAN, WILLIAM DOUG DAVIDSON, WARNER S. SMITH A/K/A TOJO, LEROY WILLIAMS A/K/A CARCHETTI, NATHANIEL JEFFERS A/K/A RAWHIDE, CECELIA WILLIS A/K/A DEE DEE, CLINTON BUSH, PAUL GRIFFIN, WILLIE J. WILLIAMS A/K/A JAMIE, ANGELIA Y. HARRIS

The Grand Jury charges:

From on or about November 1, 1971, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the date of this indictment in the Northern District of Indiana and elsewhere, GARLAND JEFFERS a/k/a PETERMAN, WILLIAM DOUG DAVIDSON, WARNER S. SMITH a/k/a TOJO, LEROY WILLIAMS a/k/a CARCHETTI, NATHANIEL JEFFERS a/k/a RAWHIDE, CECELIA WILLIS a/k/a DEE DEE, CLINTON BUSH, PAUL GRIFFIN, WILLIE J. WILLIAMS a/k/a JAMIE, and ANGELIA Y. HARRIS, the defendants herein, and WILLIAM DOUGLAS, HENRY HARRIS and JAMES POOLE, co-conspirators but unindicted, did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together and with divers others persons whose names are to the Grand Jury unknown, to commit offenses against

the United States and to violate Section 841(a)(1), Title 21 of the United States Code, to-wit: to distribute heroin, a Schedule I Controlled Substance and to distribute cocaine, a Schedule II Controlled Substance, in violation of Section 846, Title 21 of the United States Code.

The said conspiracy was to be accomplished in the following manner and by the following means:

(a) The defendants and co-conspirators and others unknown to the Grand Jury would form and continue to operate an organization known as ""The Family".

(b) The purpose of "The Family" organization was to engage in the distribution of heroin and cocaine, controlled substances and control the tariff in heroin and cocaine in and around the city of Gary, Indiana.

(c) It was part of the conspiracy that the defendant, GARLAND JEFFERS a/k/a PETERMAN, would during the period of time of the conspiracy the exact date being unknown to the Grand Jury, assume leadership of "The Family" organization.

(d) It was further part of the conspiracy that the defendants would maintain books and records of "The Family" organization's meetings and discussions and of transactions involving the distribution of controlled substances.

(e) It was further part of the conspiracy that the defendants herein would extort and attempt to extort money and narcotics from individuals engaged in the distribution of controlled substances.

(f) It was further part of the conspiracy that the defendants and co-conspirators herein would distribute controlled substances and arrange for the distribution of controlled substances by others.

(g) It was further part of the conspiracy that the defendants and co-conspirators herein would acquire substantial sums of money because of the distribution of controlled substances.

(h) It was further part of the conspiracy that defendants, CLINTON BUSH, WILLIAM DOUG DAVIDSON and LEROY WILLIAMS a/k/a CARCHETTI,

would extort from co-conspirator, JAMES POOLE, money and narcotics in November of 1971.

(i) It was further part of the conspiracy that co-conspirator, HENRY HARRIS, would supply heroin to defendants, GARLAND JEFFERS a/k/a PETERMAN, WILLIAM DOUG DAVIDSON, LEROY WILLIAMS, a/k/a CARCHETTI, and PAUL GRIFFIN, for redistribution in November and December of 1971.

(j) It was further part of the conspiracy that defendants, GARLAND JEFFERS a/k/a PETERMAN and LEROY WILLIAMS a/k/a CARCHETTI, acquired cocaine in January 1972.

(k) It was further part of the conspiracy that members of "The Family" organization would have meetings on February 21, 1972, February 25, 1972, February 29, 1972, March 5. 1972 and March 7, 1972, for the discussion of the "Family" business of distribution of controlled substances.

(l) It was further part of the conspiracy that during February and March 1972 defendant, CECELIA WILLIS a/k/a DEE DEE, kept the books and records of "The Family" organization's business meetings and transactions and would receive proceeds of narcotics transactions.

(m) It was further part of the conspiracy that co-conspirator, JAMES POOLE, would deal controlled substances for "The Family" organization pursuant to an arrangement worked out with defendant GARLAND JEFFERS a/k/a PETERMAN.

(n) It was further part of the conspiracy that co-conspirator, JAMES POOLE, dealt in controlled substances for "The Family" organization on a regular basis with defendant, WILLIE J. WILLIAMS a/k/a JAMIE, delivering unknown quantities of narcotics and receiving unknown quantities of money.

(o) It was further part of the conspiracy that in December of 1972 co-conspirator, JAMES POOLE, possessed with the intent to distribute heroin for "The Family" organization and maintained books and records regarding these transactions.

(p) It was further part of the conspiracy that ARTHUR BUCKANON would sell one-half kilogram of

heroin to defendants, WILLIAM DOUG DAVIDSON and WARNER S. SMITH a/k/a TOJO, for $14,000.00 for redistribution by "Family" members and associates through defendant, GARLAND JEFFERS a/k/a PETERMAN.

(q) It is further part of the conspiracy that defendants, GARLAND JEFFERS a/k/a PETERMAN, LEROY WILLIAMS a/k/a CARCHETTI, NATHANIEL JEFFERS a/k/a RAWHIDE, ANGELIA Y. HARRIS, and WARNER S. SMITH a/k/a TOJO would negotiate a quinine for heroin exchange with Agent Melvin O. Schabilion of the Drug Enforcement Administration during the months of December, 1973, and January, 1974.

(r) It was further part of the conspiracy that defendant, LEROY WILLIAMS a/k/a CARCHETTI, would sell heroin to Agent Schabilion.

(s) It was further part of the conspiracy that defendant WARNER S. SMITH a/k/a TOJO, a member of "The Family" organization, would advise and work with "The Family" on a regular basis and participate in the acquiring and the posting of bond money when "Family" members were arrested.

(t) It was further part of the conspiracy that defendant, GARLAND JEFFERS a/k/a PETERMAN, would supply a quantity of cocaine to LEROY WILLIAMS a/k/a CARCHETTI in January 1974.

At the approximate time hereinafter mentioned the defendants GARLAND JEFFERS a/k/a PETERMAN, WILLIAM DOUG DAVIDSON, WARNER S. SMITH a/k/a TOJO, LEROY WILLIAMS a/k/a CARCHETTI, NATHANIEL JEFFERS a/k/a RAWHIDE, CECELIA WILLIS a/k/a DEE DEE, CLINTON BUSH, PAUL GRIFFIN, WILLIE J. WILLIAMS a/k/a JAMIE, ANGELIA Y. HARRIS, named herein along with co-conspirators, WILLIAM DOUGLAS, HENRY HARRIS and JAMES POOLE, unindicted co-conspirators, committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

(1) On or about November 1, 1971, unindicted co-conspirator, JAMES POOLE, was confronted by defendants, CLINTON BUSH, WILLIAM DOUG DAVIDSON, and LEROY WILLIAMS a/k/a CARCHETTI, and forced to distribute controlled substances for "The Family" organization.

(2) On or about November 15, 1971, unindicted co-conspirator HENRY HARRIS, supplied heroin to defendants, GARLAND JEFFERS a/k/a PETERMAN, WILLIAM DOUG DAVIDSON, LEROY WILLIAMS a/k/a CARCHETTI, and PAUL GRIFFIN, for redistribution and received money for the heroin from defendant GARLAND JEFFERS a/k/a PETERMAN.

(3) During December 1971, unindicted co-conspirator, HENRY HARRIS, supplied heroin to defendant, GARLAND JEFFERS a/k/a PETERMAN.

(4) During January 1972 defendants, GARLAND JEFFERS a/k/a PETERMAN and LEROY WILLIAMS a/k/a CARCHETTI, acquired cocaine for redistribution from HARRIS, which acquisition came by force.

(5) On or about February 21, 1972, members of "The Family" organization including defendants, GARLAND JEFFERS a/k/a PETERMAN, LEROY WILLIAMS a/k/a CARCHETTI, PAUL GRIFFIN, CECELIA WILLIS a/k/a DEE DEE, and CLINTON BUSH, met for the purpose of discussing the business of "The Family" organization in the distribution of controlled substances.

(6) On or about February 25, 1972, "The Family" organization met and had a discussion of continuing the narcotics business following the arrest of "Family" members and to discuss the processing of heroin for distribution by "The Family" organization.

(7) On or about February 9, 1972, "The Family" members met which meeting included defendants, GARLAND JEFFERS a/k/a PETERMAN, LEROY WILLIAMS a/k/a CARCHETTI, and CECELIA WILLIS a/k/a DEE DEE.

(8) On or about March 5, 1972, members of "The Family" organization met to discuss distribution of heroin for distribution.

(9) On or about March 7, 1972, members of "The Family" organization met to discuss distribution of heroin and amounts of profit, and also agreed to the division of

the controlled substances that remained following a police raid.

(10) Early in 1972 defendants, GARLAND JEFFERS a/k/a PETERMAN and WILLIAM DOUG DAVIDSON, extorted money from WILLIAM DOUGLAS, unindicted co-conspirator.

(11) During March of 1972 GARLAND JEFFERS a/k/a PETERMAN arranged for JAMES POOLE, unindicted co-conspirator, to deal in controlled substances and made arrangements for co-defendant, WILLIE J. WILLIAMS a/k/a JAMIE, to supply heroin to unindicted co-conspirator, JAMES POOLE, and collect money from POOLE for payment to "The Family" organization.

(12) Defendant, WILLIE J. WILLIAMS a/k/a JAMIE, supplied controlled substances to JAMES POOLE, unindicted co-conspirator, for distribution and picked up money in payment thereof.

(13) On or about December 7, 1972, JAMES POOLE, unindicted co-conspirator, possessed with intent to distribute heroin belonging to "The Family" organization and maintained books and records regarding the distribution of controlled substances.

(14) On or about the 7th day of February, 1973, ARTHUR BUCKANON sold one-half kilogram of heroin to defendants, WILLIAM DOUG DAVIDSON and WARNER S. SMITH a/k/a TOJO, for $14,000.00 which heroin was for defendant, GARLAND JEFFERS a/k/a PETERMAN, and "The Family" organization.

(15) During December 1973 and January 1974, defendants, GARLAND JEFFERS a/k/a PETERMAN, LEROY WILLIAMS a/k/a CARCHETTI, NATHANIEL JEFFERS a/k/a RAWHIDE, ANGELIA Y. HARRIS, and WARNER S. SMITH a/k/a TOJO, negotiated a quinine for heroin exchange with Agent Melvin O. Schabilion of the Drug Enforcement Administration.

(16) On or about January 19, 1974, defendant, LEROY WILLIAMS a/k/a CARCHETTI, sold heroin to Agent Melvin O. Schabilion of the Drug Enforcement Administration.

(17) On or about January 2, 1974, defendant, GARLAND JEFFERS a/k/a PETERMAN, supplied cocaine to defendant, LEROY WILLIAMS a/k/a CARCHETTI.

A TRUE BILL

/s/ Donald G. Eldridge
Foreman

John R. Wilks
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Hammond Criminal No. H CR 74-56

[Filed Apr. 9, 1974, At ____M, Francis T. Grandys, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

vs.

GARLAND JEFFERS, a/k/a PETERMAN; WILLIAM DOUG DAVIDSON; WARNER S. SMITH, a/k/a TOJO; LEROY WILLIAMS, a/k/a CARCHETTI; NATHANIEL JEFFERS, a/k/a RAWHIDE; CECELIA WILLIS, a/k/a DEE DEE; CLINTON BUSH; PAUL GRIFFIN; WILLIE J. WILLIAMS, a/k/a JAMIE; and ANGELIA Y. HARRIS

MOTION FOR TRIAL TOGETHER

Comes now the United States of America by its attorney, John R. Wilks, United States Attorney for the Northern District of Indiana, and moves the Court for trial together of the case of United States of America vs. Garland Jeffers, Hammond Criminal No. H CR 74-57 and the above-captioned cause, and in support of its motion represents to the Court the following:

1. That in the case of United States of America vs. Garland Jeffers, et al., H CR 74-56, the above-listed defendants are charged with Conspiracy to commit offenses against the United States and to violate Section 841(a)(1), Title 21, United States Code, to wit: to distribute heroin, a Schedule I Narcotic Drug Controlled Substance, and to distribute cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Section 846, Title 21 of the United States Code. This cause is set for trial as a first setting on May 20, 1974, at 10:00 a.m.;

2. That in the case of United States of America vs. Garland Jeffers, H CR 74-57, the defendant, Garland

Jeffers is charged with knowingly and unlawfully engaging in the Northern District of Indiana, in continuing criminal enterprises in committing violations of Section 841(a)(1), Title 21, United States Code, in concert with five or more other people with respect to whom he occupied a position of organizer, supervisor and manager and further as a result of such distribution and other activity obtained substantial income in violation of Section 848, Title 21 of the United States Code. This cause is set for trial as a first setting on June 17, 1974, at 10:00 a.m.;

3. That under Rule 13 of the Federal Rules of Criminal Procedure the Court may order two or more indictments to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information, and further that the procedure shall be the same as if the prosecution were under a single indictment or information;

4. That under Rule 8 of the Federal Rules of Criminal Procedure, the offenses and the defendants in the above-mentioned cause could have been joined in a single indictment of information in that the offenses charged are of the same or similar character based on the same acts or transactions constituting parts of a common scheme or plan and further that the defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count;

5. That much of the evidence in the case of United States of America vs. Garland Jeffers, H CR 74-57, is based on the same transactions and series of transactions as in the case of United States of America vs. Garland Jeffers, et al, H CR 74-56.

WHEREFORE, on the basis of the close relationship of the two causes and in the interest of economy and efficiency in judicial administration, the Government respectfully requests the Court to try together the case of United States of America vs. Garland Jeffers, et al., H

CR 74-56, and United States of America vs. Garland Jeffers, H CR 74-57, as a first setting on May 20, 1974.

Respectfully submitted,

JOHN R. WILKS
United States Attorney

By: /s/ Fred W. Grady
FRED W. GRADY
Assistant United States Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Criminal No. H Cr 74-56

[Filed Apr. 29, 1974, At ____M, Francis T. Grandys, Clerk, U.S. District Court]

UNITED STATES OF AMERICA

v.

GARLAND JEFFERS a/k/a PETERMAN, WILLIAM DOUG DAVIDSON, ET AL.

OBJECTION TO GOVERNMENT'S MOTION FOR TRIAL TOGETHER AND MEMORANDUM IN SUPPORT THEREOF

The Government has filed a motion for trial together, requesting that *United States* v. *Garland Jeffers*, No. H Cr 74-57 be consolidated with the above entitled cause for the purpose of trial on May 20, 1974. To this motion, the defendants interpose an objection and assert that the consolidation of *United States* v. *Garland Jeffers*, et al, No. H Cr 74-56 and *United States* v. *Garland Jeffers*, No. H Cr 74-57 would represent an improper joinder, prejudicing the rights of all defendants herein.

United States v. *Garland Jeffers*, et al, No. H Cr 74-56 represents an indictment of ten (10) defendants who are charged in one Count with a violation of Sec. 841(a) 1, Title 21 of the United States Code, which is a conspiracy to distribute heroin, a Schedule I Controlled Substance and to distribute cocaine, a Schedule II Controlled Substance, in violation of Sec. 846, Title 21 of the United States Code. *United States* v. *Garland Jeffers*, No. H Cr 74-57 represents an indictment of a single defendant, charging him with a violation of Sec. 848, Title 21 of the United States Code with engaging in a continuing criminal enterprise.

Simply stated, the defendants assert that an improper joiner would exist if the two (2) indictments were consolidated for the purpose of trial for the reasons that neither the parties nor the charges are the same and,

as such, would be violative of Rules Eight and Fourteen of the Federal Rules of Criminal Procedure.

As authority for this proposition the defendants cite the case of *United States* v. *Spector* (7th Cir. 1963) 326 F.2d 345, wherein the defendants, Spector and Scott were named as principal defendants in a nine (9) count indictment. In Count I of the indictment, they were charged with a conspiracy under 18 U.S.C. Sec. 371 to violate 18 U.S.C. Sec. 1006, (defrauding Federal Credit Institutions).

In Counts II through IX, Spector and two (2) others, namely, Jacobs and Starr, were charged with a violation of Title 18, U.S.C. Sec. 1010 (making false statements to the Federal Housing Authority). Both Spector and Jacobs were named as defendants in four (4) of the substantive counts while Spector and Starr were joined in two (2) counts. All three defendants were joined in the remaining two (2) counts.

The Court of Appeals recognized the similarity between Sections 1006 and 1010 since both relate to false statements and forged instruments made for the purpose of obtaining loans from lending institutions whose accounts are insured by Federal Agencies. Nevertheless, the Court held that a joinder of Count I of the indictment with the remaining counts runs afoul of Rule Eight which permits joinder of two (2) or more defendants in the same indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

The Court of Appeals pointed out, however, that the defendant, Scott, was not charged with having participated in the acts or transactions alleged in Counts II through IX, nor were Jacobs and Starr charged with violating the substantive statute underlying the conspiracy count. The Court, therefore, held:

> "In conclusion, it is apparent in the instant case, that there is no identity of defendants, of the character of the offenses, the allegations of fact, or of the time. Therefore, a severance should have been granted." at p. 351.

Furthermore, the defendants cite the case of *United States* v. *Solomon* (1960) 26 F.R.D. 397 wherein the District Court for the Southern District of Illinois confronted a seven (7) Count indictment, the first six (6) Counts of which alleged substantive offenses of the Mail Fraud Act and the seventh (7) Count alleged a conspiracy between the defendants and others to violate that act. In first coping with the motion to sever the six (6) substantive offenses, the Court held:

> "The 6 substantive offenses charged are closely related in point of time, and each is alleged to be a part of a single continuing scheme to defraud. To some degree it appears that the same evidence may tend to prove each of the 6 counts . . . . The Court cannot say that the defendants will be prejudiced by a joint trial on the substantive counts." at p. 403.

The District Court reached a contrary conclusion with regard to the seventh (7) Count, namely that of conspiracy:

> "A more serious question is presented by the motion to compel election between the substantive counts and the conspiracy count. Of necessity, to some extent, a jury sitting on the trial of this cause will be faced with a mass of evidence relating to all, or a number of the counts, and also with evidence which relates to each count alone. While it appears to be true that much of the evidence introduced to prove the substantive counts will be relevant also to the conspiracy charge, trial of the conspiracy count with the substantive counts can be expected to flood the jury with a mass of evidence admissible on the conspiracy charge only. At best, contemplation of a trial of all seven (7) Counts simultaneously suggests that the situation would be very confusing for any jury. In its worst light, the contemplated situation inherently contains the probability of prejudice to defendants in as much as evidence admissible upon the conspiracy count alone, must perforce affect the jury's thinking when it con-

siders the fact questions presented by the substantive counts." at p. 403.

In the case at bar, the Government is attempting to consolidate a conspiracy of ten (10) defendants with a substantive offense of one (1) defendant. Such a consolidation should be viewed with disfavor.

> "If a prosecution for the substantive offense be adequate, inclusion of the conspiracy count should be carefully scrutinized and separate trials should be had if it appears that the conspiracy count, like a two-edged sword, serves a principal purpose to give the Government a procedural advantage and a corresponding advantage of probably prejudicial effect upon the defendants' rights." *Solomon* (supra) at p. 104.

The Government undoubtedly contends that to consolidate the two (2) causes above mentioned would save considerable time and expense. The Court in *Solomon* squarely raises this issue. The *Solomon* Court contends that there is no repugnancy between the counts of the indictment yet:

> ". . . in the exercise of a sound discretion it ought to compel the Government to elect whether it will proceed upon the conspiracy count or the substantive counts. *The added expense to the Government of time and money in trying the conspiracy and substantive charges separately is, of course, a factor to consider, but that is a factor of small moment compared to the probable prejudice to the defendants of disposing of all charges in one grandiose trial.*" (Emphasis ours) at p. 404.

There are ten (10) individuals indicted in the conspiracy count among other unindicted co-conspirators. The Government has alleged seventeen (17) overt acts perpetrated by some or all of the defendants, of which the defendant, GARLAND JEFFERS, is named in only ten (10) of said acts. Furthermore, it is anticipated that the Government will attempt to prove additional overt

acts other than those enumerated in the conspiracy indictment incriminating some or all of the defendants.

What is more, the Grand Jury has charged that the conspiracy in question was formed and remained in existence from November 1, 1971, until March 18, 1974, a period of approximately two and one-half (2½) years. By virtue of the confusing nature of a conspiracy charge, coupled with the fact that there are ten (10) if not more individuals involved in said conspiracy, compounded by the fact that it allegedly existed over an extensive period of time, it is contended that the trial of the conspiracy alone would constitute a difficult and confusing assortment of facts for a jury to entertain, segregate and evaluate. To stack an additional substantive offense such as "engaging in a continuing criminal enterprise", which is a most serious and complicated offense, on top of an already confusing conspiracy charge is to simply compound the complexity of the issues and to create an impossible if not Herculean task for the jury.

Such was the case in *United States* v. *Haupt* (1943) 136 F.2d 661 wherein the Court of Appeals for the Seventh Circuit confronted a one (1) Count indictment charging several defendants with various overt acts committed by some one (1) or more of the defendants. The charge against the defendants in this case was treason. The Court stated:

> ". . . that the introduction of evidence in a joint trial relating to said overt acts not alleged to have been participated in by all defendants might lead to confusion and prejudice as to those who had not participated in the said overt acts." at p. 673.

The Court further stated:

> "We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted. We have equal doubt that any jury, or for that matter any Court, could perform such a Herculean feat." at p. 672.

The Court held that the trial Judge abused his discretion in denying the motion for severence and in his failure to grant a new trial.

The defendants further suggest to the Court that the consolidation of the above two (2) causes for trial would be conducive, not only to confusion, but to clearly prejudice the rights of all defendants herein by creating a "steamroller" effect upon the minds of the jurors. The sheer aggregate of evidence amassed by the Government and provided to the jury would create an inference of criminal disposition based upon mere association with other defendants against whom the evidence is stronger. The consolidation of the above offenses would instill a serious hostility by the jurors against all of the defendants, despite the fact that there would be insufficient evidence on any given transaction or act to convict. In *Drew* v. *United States* (1964) 331 F.2d 85, the Court of Appeals for the District of Columbia stated:

> "The justification for a liberal rule on joinder of offenses appears to be the economy of a single trial. The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) He may become embarrassed or confounded in presenting separate defenses; (2) The jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) The jury may accummulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus, in any given case the Court must weigh the prejudice to the defendant caused by the joinder against the obviously poor consideration of economy and expedition in judicial administration" at p. 88.

It is clear that the above considerations by the District of Columbia Court of Appeals loom large in the case

presently at bar. Furthermore, it is important to note that said considerations of prejudicial effect to the defendants are determinative, even though joinder may be permissible under Rule 8. *Dunaway* v. *U. S.*, 205 F.2d 23, 24 (1953); *Peckham* v. *U. S.*, 210 F.2d 693, 697-698 (1953); *Chambers* v. *U. S.*, 301 F.2d 564 (1962).

In *Drew* v. *U. S.* (supra) the Court of appeals for the District of Columbia addressed the issue of prejudice to the defendants when joinder was in fact permissible under Rule 8:

> "Thus even though the joinder is permissible under 8(a), if the defendant makes a timely motion under Rule 14 and shows prejudice, the Court should either order an election by the Government or grant separate trials. Here the joinder in the indictment under Rule 8(a) was permissible since the two crimes are similar in nature. Having in fact been tried together over the timely protest of appellant before, during and after the trial, our inquiry now is as to whether the trial record indicates sufficient possibility of prejudice by reason of such joinder for trial as to require reversal. We believe that it does." at p. 87.

The Court in *Drew* apparently established the rule governing whether a new trial should be granted as a result of the trial Court's refusal to grant a severance:

> "On this record, we cannot say that the jury probably was not confused or probably did not misuse the evidence. . ."

The defendants strongly urge the Court to consider the fact that they and each of them stands to be seriously prejudiced by a consolidation of the two (2) trials herein. Courts, from time in mind, have enunciated the danger in the consolidation of indictments. An excellent example is that of Judge Learned Hand in *U. S.* v. *Lotsch* 102 F.2d 35 (1939) wherein Judge Hand states:

> "There is indeed always a danger when several crimes are tried together, that the jury may use the

> evidence cumulatively; that is, that although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all. This possibility violates the doctrine that only direct evidence of the transaction charged will ordinarily be accepted, and that the accused is not to be convicted because of his criminal disposition."

It is difficult to anticipate what if any evidence the Government intends to use in either of the above indictments since counsel for the defendants is not privy to such information, nor has there been any disclosure whatsoever by way of discovery by the Government to the defendants. It would however, seem fair to assume that there will be evidence relating to at least thirteen (13) separate individuals, that the evidence will embrace at least seventeen (17) alleged overt acts and that it will span a period of approximately two and one-half (2½) years.

It is noteworthy that the defendant, GARLAND JEFFERS, who is charged by himself in Cause No. H Cr 74-57 is named in only ten (10) of the seventeen (17) overt acts listed in the conspiracy indictment and further, is alleged to have actively participated in only nine (9) of those seventeen (17) acts. This being the case, it is likely that much of the evidence which will be presented in the conspiracy trial does not "directly" inculpate the defendant, GARLAND JEFFERS, and would, therefore, be inadmissible against him in the "continuing criminal enterprise" indictment unless a direct link could be established. All of the said overt acts would, however, be admissible, or at least arguably so, in the conspiracy trial. The prejudice to the defendant, JEFFERS, is therefore, imminent and clear.

It is suggested to the Court that the Government will offer evidence which may tend to suggest that the defendant, GARLAND JEFFERS, is in fact the "ring leader" and will do so by attempting to inculpate the defendant, JEFFERS, in one or two transactions directly and by way of insinuation and inference suggest that

he is responsible for all other transactions, thereby subjecting him to the provisions of Sec. 848, Title 21 U.S.C., to-wit: Engaging in a continuing criminal enterprise. The Government intends to offer evidence which is arguably admissible under the conspiracy statute so as to inculpate the defendant, evidence which would not be admissible in the continuing criminal enterprise indictment. Such was the tactic used by the Government in *King* v. *U. S.* 355 F.2d 700 (1st Circuit) where in footnote 6 the Court stated:

> "In connection with the July 14th sales in which King allegedly participated, King was "The Man". On McKenney's source of supply, the Government agent was unsuccessful in learning who was McKenney's "man" on the other occasions. It seems to us that it might be natural for the jury to fill this void with King. If it did, the Government was thereby showing other offenses by King not included in the indictment, the very thing it could not properly do and of which in fact it had no evidence warranting the inference."

In conclusion, the defendants assert that to consolidate the indictments as per the Government's request would constitute an improper joinder since there is neither an identity of defendants nor an identity of charges.

Secondly, assuming for the purpose of argument, that joinder is in fact permissible, the defendants contend that the consolidation of the above causes would irreparably prejudice the jury in an unjustifiable fashion against each of the defendants and would so confound and confuse the jury so as to make an impartial and fair determination impossible.

As an example of such confusion which can lead from improper joinder, see *U. S.* v. *Varelli*, 407 F.2d 735 (1969), which was decided by the Court of Appeals for the Seventh Circuit. It is therefore, for the above and foregoing reasons that the defendants object to the Gov-

ernment's motion for trial together and move the Court to deny said motion.

Respectfully submitted,

COHEN AND THIROS
Attorneys for defendants

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UNITED STATES DISTRICT COURT
NORTHERN DIVISION OF INDIANA
HAMMOND DIVISION

No. H Cr 74-57

[Filed Mar. 5, 1975]

UNITED STATES OF AMERICA, PLAINTIFF

v.

GARLAND JEFFERS, DEFENDANT

MOTION TO DISMISS THE INDICTMENT

Comes now the Defendant, Garland Jeffers, by his attorneys, Stephen Bower and E. Kent Moore, and respectfully moves that the Court dismiss the continuing criminal enterprise indictment against him for the reason that this Defendant has already been placed in jeopardy and in support thereof Defendant says:

1. That Garland Jeffers was indicted on March 18, 1974 on two (2) separate charges, to-wit: continuing criminal enterprise, being Cause No. HCR 74-57 and conspiracy to distribute heroin, being Cause No. HCR 74-56.
2. That the defendant, Garland Jeffers, was tried upon the conspiracy charge, was convicted, and has received an executed sentence; said defendant is currently serving time on this conviction.
3. That the conspiracy charge in HCR 74-56 involved proof that Garland Jeffers belonged to, and was the head of, an organization called the "Family" in Gary, Indiana, and that the purpose of this organization was the illegal distribution of heroin.
4. That the Defendant is currently charged with the crime of a continuing criminal enterprise beginning November, 1971, to distribute heroin.

5. Defendant alleges that the conspiracy and the continuing criminal enterprise charges grow out of the same alleged criminal behavior.

6. That as a matter of fact, several of the government's witnesses in HCR 74-56 (the conspiracy trial) will be the same in HCR 74-57; these witnesses are James Henry Poole, David Baldwin, Henry Harris, William Douglas, Jevita Hobbs, and Daniel Yaksich. These witnesses are all non-police officers; also, several of the same police officers will be called as witnesses. That the Defendant's trial on the continuing criminal enterprise will be a rehash of the conspiracy trial with additional elements.

7. Defendant alleges that the same evidence will be introduced against him in his second trial; that all of the evidence was available to the government at the time of his conspiracy trial.

8. That even though the government attempted to consolidate the two (2) charges into the trial on the conspiracy, this does not relieve the government from having made a choice upon which charge to try the Defendant, they are now estopped to try him on the other charge.

9. The government cannot avoid the implication of the double jeopardy rule by claiming that since the Defendant objected to the joinder of the continuing criminal enterprise charge in the conspiracy trial that he has waived his rights; Defendant contends that by exercising his constitutional right to have a fair trial, apart from a prejudicial joinder, he can't be held to have waived his double jeopardy right.

WHEREFORE, Defendant, Garland Jeffers, prays for dismissal of the indictment against him on the grounds of double jeopardy.

Respectfully submitted,

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GARLAND JEFFERS

The double jeopardy clause reads: "Nor shall any persons be subject for the offense to be twice put in jeopardy of life or limb; . . ." Justice Blacks' opinion in *Green* vs. *United States*, 355 U.S. 184 (1957), gives the clearest statement of the doctrine:

> (T)he State will all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . (355 U.S. at 187)

Collateral Estoppel, 48 Den.L.J. 130, 136 (1971); Lucker, Collateral Estoppel—An Attempted Transfusion into the Guarantee Against Double Jeopardy, 44 Temp.L.Q. 377 (1971); and Notes, 69 Mich.L.R. at 777.

In order to provide meaningful double jeopardy protection the American Law Institute Model Penal Code, § 1.07(2), provides:

> (A) defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial.
> (Model Penal Code § 1.07(2), Proposed Draft, 1962)

Along this same theme, the ABA Project of Minimum Standards for Criminal Justice, Joinder and Severance, § 1.3, afforded a Defendant the right to request joinder of all charges "based on the same conduct or arise from the same criminal episode." The Advisory Committee felt that a defendant should not be subjected to multiple trial on related offenses.

Other State jurisdictions, either by statute or by case decision, have come to the above statement of the law. Statutes in California, New York, Illinois, Minnesota, and Indiana have provided meaningful double jeopardy protection. See Calif. Penal Code 654; Ill. Rev. Stat. ch. 38, S3-3 (1963); N.Y.Crim. Proc.L. 40.30 (2), McKinney's Consol. Laws, C. 11-A; 40 Minn. Stats. Anno. 609.035; Indiana Code 35-3.1-1-10(c). Cases decisions to same effect are State v. Brown, 497 P.2d 1191, 1198 (Ore. S.Ct. 1972) and Commonwealth v. Campana, Pa., 304 A.2d 432 (1973). The net results of these statutes and case decisions is to adopt the rule of law as set forth by Justice Brennan, in a minority opinion in Ashe; Justice Brennan's statement reads as follows:

> This "same transaction" test of "same offense" not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jepopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy and convenience.
> (397 U.S. at 454)

Defendant argues that by requiring compulsory joinder of all criminal charges in one indictment arising out of a single transaction is only fair and just. The defendant should not be forced to run the gauntlet of multiple prosecutions by an awesome government, whose resources are unlimited. Defendant contends that there is no specific guide line from the United States Supreme Court on the constitutional minimum standard. Defendant argues that the trial court should require the government to bring, in a single proceeding, all known charges against the defendant arising from a single criminal episode.

Applying this rule to the case at bar, the fact reveals that the defendant has been convicted of the charge of conspiracy to distribute heroin. Defendant contends that his current charge of a continuing criminal enterprise simply adds some other elements to the conspiracy charge. The charges arise out of the same illegal heroin traffic transaction in Gary, Indiana. Therefore, the second prosecution out of the same transaction is violative of the double jeopardy clause.

THE "SAME EVIDENCE" RULE

The defendant maintains that even if the Court applies the traditional same evidence rule as set forth in the majority opinion in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), the Defendant is still entitled to a dismissal. Blockburger v. United States, 284 U.S. 299, 304 (1932) adequately states the law:

> Where the same act or transactions constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

The Defendant contends that if the government proves the continuing criminal enterprise charge, it will have proven the conspiracy charge all over again. In other words, the same evidence needed to prove the continuing criminal enterprise would also prove the conspiracy charge. A brief examination of the two respective statutes reveals this fact. Title 21, Sections 846 and 848.

The Defendant would cite as controlling the cases of *Hattaway* v. *United States*, 399 F.2d 431 (5th Cir. 1968), *Robinson* v. *Neil*, 366 F. Supp. 924 (D.C.E.Tenn., 1973), and *Rouzie* v. *Comm.*, 207 S.E.2d 854, Va., 1974. These cases held that conviction of a lesser included offense will bar the prosecution on the greater offense. Both of these cases applied the same evidence tests, and since no additional evidence was needed to prove the lesser included offense, prosecution on the lesser offense barred prosecution on the greater.

The continuing criminal enterprise charge requires proof of "a continuing series of violations (of the drug laws) which are undertaken by such person in concert with five or more other persons. . ." If an individual acts in concert with five or more to distribute heroin, there has been a conspiracy. The Court cannot avoid such a conclusion—there cannot be a continuing criminal enterprise without a conspiracy. Therefore, since the government has prosecuted the Defendant for the lesser

included offense of conspiracy, the government is prohibited from prosecuting for the greater offense of a continuing criminal enterprise. The government did not have to proceed to trial with this defendant in the conspiracy case, but it chose to do so. By so choosing, the government elected which of the two cases it was going to prosecute. The government, as powerful as it is, cannot continue in a series of prosecutions of the defendant based on the same facts. Justice under our constitution demands the dismissal of this indictment.

The defendant anticipates that the government will allege that the Defendant has waived his right to no double jeopardy by objecting to the consolidation of the continuing criminal enterprise charge with the conspiracy charge. Defendant argues to the court, that the Court found that such a consolidation would result in a prejudicial joinder against this defendant. The defendant, as a matter of constitutional law, is entitled to a fair and impartial trial. The defendant's efforts to require a fair trial for himself cannot be interpreted as a waiver of Fifth Amendment rights. More specifically, when the defendant exercises his Sixth Amendment right of demanding a fair trial, he cannot be held to have waived his Fifth Amendment rights of no double jeopardy. The government could have dismissed the conspiracy charge against this defendant, if it wanted the continuing criminal enterprise conviction. In Simmons v. United States, 390 U.S. 372 (1968) the United States Supreme Court made it clear that when a defendant testifies at a hearing on a search and seizure issue, his testimony cannot

be used again at the trial. Exercising a constitutional right cannot be held to be a waiver of other rights.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

H CR 74-57

[Filed Mar. 10, 1975 at 8:15 a.m.]

UNITED STATES OF AMERICA

vs.

GARLAND JEFFERS

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS INDICTMENT

Comes now the United States of America by John R. Wilks, United States Attorney for the Northern District of Indiana, and for its response to the Motion to Dismiss the Indictment by the defendant shows the Court as follows:

1. The charge in this cause H CR 74-57 is distinct and separate from the charge in H CR 74-56 which led to the conviction of the defendant.

2. There are additional required elements which the Government is forced to prove in a charge involving a continuing criminal enterprise.

3. Because the crimes are separate and independent offenses, the defendant is not put in jeopardy twice for the same offense.

4. The doctrine of collateral estoppel does not apply.

5. In support of the foregoing the Government submits the following memoranda of law in support of its response.

WHEREFORE, the United States of America prays that the motion of the defendant to dismiss the indictment be in all things denied.

JOHN R. WILKS
United States Attorney

By: /s/ Richard A. Hanning
RICHARD A. HANNING
Assistant United States
Attorney

MEMORANDUM IN SUPPORT OF GOVERNMENT'S RESPONSE TO MOTION TO DISMISS

Counsel for defendant has filed a motion to dismiss the indictment in the instant case on the basis that the defendant has been placed in jeopardy due to his trial and conviction in H CR 74-56. Such a contention is without foundation.

As the Court is well aware, the defendant was tried and convicted for conspiracy to distribute heroin in violation of Title 21, United States Code, Section 846. In the instant case, the defendant is charged with engaging in a continuing criminal enterprise in violation of Title 21, United States Code, Section 848. The Government submits that the two statutes are separate and distinct violations and statutorily require different elements of proof. Contrast the elements necessary to be proven by the Government to sustain the conviction under Title 21, United States Code, Section 846, as opposed to Section 848. In a Section 846 prosecution the Government must prove the basic elements of conspiracy, that is to say, that two or more people have conspired to commit the offense and that during the pendency of the conspiracy at least one overt act was committed by one or more of its members in furtherance of the objective of the conspiracy. Title 21, United States Code, Section 848, requires proof of the elements previously set out in Section 846 but additional elements are required: (1) acting in concert with five or more people; (2) being in a supervisory position over these people; and (3) obtaining substantial income or resources from the enterprise.

As the Supreme Court held in *Blockburger* v. *United States*, 284 U.S. 299 (1932), when addressing the question of double jeopardy:

> Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses

> or only one is whether each provision requires proof of an additional fact which the other does not.
>
> At page 182.

Clearly, in reviewing the two statutes, the issues there are different elements of proof required to sustain a conviction. The defendant is not entitled to a dismissal of the indictment. As the Court in *Blockburger* further stated:

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.
>
> At page 182.

In addition to the rulings set out above, the Supreme Court has held that each case involving a question of double jeopardy must be decided on its own merits. In *Hoag* v. *State of New Jersey*, 356 U.S. 464, 78 S.Ct. 829 (1958) has stated:

> We do not think that the Foureenth Amendment always forbids states to prosecute different offenses at consecutive trials even though they arise out of the same occurrence. The question in any given case is whether such a course has led to fundamental unfairness.

The Court in *Hoag* went on to state:

> In the last analysis, a determination of whether an impermissible use of multiple trials has taken place cannot be based on any overall formula. Here as elsewhere, the pattern of due process is picked out in the facts and circumstances of each case.

To further strengethen the Government's contention, consider the case of *Ciucci* v. *State of Illinois*, 356 U.S. 571, 78 S.Ct. 839 (1958). In *Ciucci*, four separate indictments were returned charging the defendant with

murder of his wife and three children. All murders were committed at the same point in time. The defendant was tried in three successive trials with the murder of his wife, then followed by the trial for each of his children. He was convicted and sentenced to twenty years in trial number one, forty-five years in trial number two, and to death in trial number three. He appealed claiming double jeopardy and denial of due process. The Supreme Court held:

> The state was constitutionally entitled to prosecute these individual offenses singly at separate trials, and to utilize therein all relevant evidence in the absence of proof establishing that such a course of action entailed fundamental unfairness.

The defendant points to *Ashe* v. *Swenson*, 397 U.S. 436 (1970) as controlling. In the opinion of the Government, the *Ashe* case goes to the question of the application of the doctrine of collateral estoppel, such a doctrine is not applicable here. "No issue tried in the prior conspiracy was determined in favor of the defendant. Thus collateral estoppel is not applicable." *Sealfrom* v. *United States*, 332 U.S. 575, 78, 79, 68 S.Ct. 237 (1948).

In summary, when considering that there are separate and distinct statutes involved, each require different elements of proof, the defendant cannot say in keeping with the authority cited, that the Government's course of action entails "fundamental unfairness".

John R. Wilks
United States Attorney

By: /s/ Richard A. Hanning
RICHARD A. HANNING
Assistant United States Attorney

[1051] COURT'S INSTRUCTIONS IN THE CONTINUING CRIMINAL ENTERPRISE TRIAL, H Cr 74-57

THE COURT: Members of the Jury:

[1] At this time it becomes the duty of the Court to instruct you on the law as it applies to this case.

It will be your duty as jurors to follow the law as the court states it to you. On the other hand, you must keep in mind that it is the exclusive province of the jury to determine the facts of the case, and for that purpose to consider and weigh the evidence.

[2] If in these instructions any rule, direction, or idea be stated more than once or in different ways, no emphasis is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction, and ignore the others, but you are to consider all of the instructions as a whole, and you are to regard each instruction in light of all the others.

[3] You, the jury, are the sole and exclusive judges of all questions of fact and proof. It is your exclusive right to determine what facts have or have not been proven. [1052] You are also the sole judges of the weight of the evidence, and you have the exclusive right to determine what inferences and conclusions may reasonably be drawn therefrom.

However, it is the province of the Court to determine the law, and you are to be governed by the law as given to you by the Court. You must not permit sympathy, prejudice, or other emotions to sway you from your sworn duty. Upon the facts as you find them to be from the evidence, and the law as given to you by the Court, and otherwise, shall you determine your verdict.

[4] Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence, and regard that fact as proved.

The Court may take judicial notice of certain facts or events. When the Court declares that it will take judicial notice of some fact or event, you may accept the Court's declaration as evidence, and regard as proven the fact or event which has been judicially noticed, but you are not required to do so since you are the sole judges of the facts.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and [1053] all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated; and all facts and events which may have been judicially noticed; and all applicable presumptions stated in these instructions.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find them have been proven, such reasonable inferences as you feel are justified in the light of experience.

[5] It is the right and duty of attorneys for both the defendant and the Government to object to questions asked by opposing counsel when they feel that such objections are appropriate and necessary, and you are in no way to consider in your deliberations the frequency or nature of objections made by counsel for either side.

[6] During the progress of the trial, questions have been asked of certain witnesses which the Court did not allow them to answer. In your deliberations you will disre- [1054] gard those questions and everything contained in them and confine yourselves to a consideration only of the evidence before you. An unanswered question is of no value for any purpose and must be disregarded.

During the trial, answers of certain witnesses were, upon motion, stricken out by the Court. In your deliberations you will disregard such answers and give no consideration whatever to matters stricken from the record in forming your verdict.

[7] A defendant in a criminal case is presumed by law to be innocent. That presumption remains with him throughout the trial unless and until he is proven guilty of the crime charged by credible evidence beyond a reasonable doubt.

[8] A reasonable doubt means a doubt that is based on reason and must be substantial rather than speculative. It must be sufficient to cause a reasonably prudent person to hesitate to act in the more important affairs of his life.

[9] The burden of proving defendant guilty beyond a reasonable doubt rests upon the Government. This burden never shifts throughout the trial. The law does not require a defendant to prove his innocence or to produce any evidence. He may rely upon evidence brought out on cross-examination of witnesses for the Government. If the Government fails [1055] to prove the defendant guilty beyond a reasonable doubt the jury must acquit him.

[10] The guilt of the accused is not to be inferred because the facts proved are consistent with his guilt, but, on the contrary, before there can be a verdict of guilty you must believe from all the evidence and beyond a reasonable doubt that the facts proved are inconsistent with his innocence. If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you should adopt that of innocence.

[12] You are instructed that under the law the defendant is not required to testify, and if the defendant chooses not to testify you are not permitted to consider this in your deliberations. You may not consider the defendant's failure to testify as evidence; the defendant has the constitutional right to remain silent, and never has the burden of presenting evidence. The burden is always upon the Government to prove the defendant guilty beyond a reasonable doubt.

[13] A defendant may be proven guilty by either direct or circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness; circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. The law makes no distinction between the [1056] weight to be given either direct or circumstantial evidence; it requires only that the jury, after weighing all the evidence, must be convinced of the guilt of the defendant beyond a reasonable doubt before he can be convicted.

[14] The defendant is not on trial for any act or conduct not alleged in the indictment. Therefore, in deliberating on your verdict in this case, you should consider only matters which have been alleged in the indictment and will disregard those matters not alleged in the indictment.

[15] The mere presence of a defendant at the scene of a crime, without the defendant actively participating in its commission is not sufficient evidence upon which to convict such a defendant.

[16] You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an [1057] accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses,

may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

On the basis of these considerations, and your experience and relations with mankind, you should give the testimony of each witness such weight as you think it deserves.

[17] The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of the greater credence. You may find that the testimony [1058] of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

[18] In this case, you have heard the testimony of expert witnesses based upon their analyses of certain records, documents, and testimony which have been introduced in evidence. This class of testimony is proper and competent evidence concerning matters involving knowledge, skill or experience in a subject which is not within the realm of ordinary knowledge of mankind and which requires special training or study to understand. The law allows those skilled in special fields to express opinions and to say whether or not, according to their knowledge and experience, a fact may or may not exist.

Nevertheless, although such opinions are allowed to be given, it is entirely within the province of the jury to say what weight shall be given to them. Jurors are not bound to the testimony of such experts is to be canvanssed and weighed as that of any other witness. Just so far as their testimony appears to your judgment, convincing you of its truth, you should adopt it, but the mere fact that a witness is called an expert, and gives an opinion or opinions upon a particular point, does not

necessarily obligate the jury to accept his opinions as to what the facts are.

[1059] [19] The testimony of an informer who provides evidence against a defendant for pay, or from immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest, or by prejudice against the defendant.

The testimony of a narcotics addict who provides evidence against a defendant must also be examined and weighed by the jury with great care.

[20] The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony, that is, of a crime punishable by imprisonment for a term of years. Prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may consider in determining the credibility of the witness. It is the province of the jury to determine the weight to be given to any prior conviction as impeachment.

[21] The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given [1060] the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

[22] An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charge. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care.

You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

[23] The Court instructs the jury that the testimony offered by officers shall not be given any greater weight [1061] or credibility by the fact alone of their office, but that such testimony shall be weighed and considered as to credibility on the same ground and for the same reason that the testimony of all other witnesses are weighed and judged.

[24] The testimony of an admitted perjurer should always be considered with caution and weighed with great care.

[25] The crime charged in this case requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

[26] The defendant is charged in a one count indictment charging a violation of Title 21, United States Code, Section 848. The indictment reads as follows:

"On or about the 1st day of November, 1971, the exact date is to the Grand Jury unknown, and continuing to the date of this indictment, in the Northern District of Indiana, and elsewhere, GARLAND JEFFERS, defendant herein, knowingly and unlawfully did engage in continuing criminal enterprise in that he did distribute and possess with intent to distribute heroin, in amounts

to the Grand [1062] Jury unknown, a Schedule I Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1), a felony, and cocaine, a Schedule II Narcotic Drug Controlled Substance, in amounts to the Grand Jury unknown, in violation of Title 21, United States Code, Section 841(a)(1), a felony and undertook such distribution in concert with five or more other people, with respect to whom he occupied a position of organizer, supervisor and manager and further as a result of such distribution and other activity obtained substantial income in violation of Section 848, Title 21 of the United States Code."

To this charge the defendant has entered a plea of Not Guilty.

[27] The [indictment] is not evidence of defendant's guilt. It is merely the formal manner by which the government accuses a person of crime in order to bring him to trial. The jury must not be prejudiced against a defendant because an [indictment has been returned] against him.

[29] Title 21, of the United States Code, gives a definition of a continuing criminal enterprise as follows:

For purposes of this section a person is engaged in a continuing criminal enterprise if, he violates any provision of this subchapter, or subchapter 2 of this chapter, the punishment for which is a felon, and such violation is a part of a continuing series of violations of this [1063] subchapter or subchapter 2 of this chapter, which are undertaken by such person in concert with five or more other persons with respect to whom such persons occupies a position of organizer, a supervisory position, or any other position of management, and from which such person obtains substantial income or resources.

[30] The violation which the Government must prove as the first element of its case against the defendant may be a violation of Title 21 of the United States Code, Section 841(a)(1) of the United States Code, which provides in part as follows:

Except as authorized (by law), it shall be unlawful for any person knowingly or intentionally . . . to dis-

tribute . . . or possess with intent to . . . distribute . . . a Controlled Substance.

The elements of the crime set forth in the above section, so far as here relevant, are that an individual or individuals:

Distributed or possessed with intent to distribute a Schedule I or a Schedule II Controlled substance;

That such distribution or possession with intent to distribute was done knowingly and intentionally and with specific intent.

[31] The violation which the Government must prove as the first element of its case against the Defendant, [1064] as an alternative to a violation of 21 USC Section 841(a)(1), may be a violation of Title 21 of the United States Code, Section 846, which reads in part as follows:

Any person who . . . conspires to commit any offense defined in this subchapter is . . . guilty of an offense against the law of the United States of America.

The offense against the United States that was allegedly the object of the alleged conspiracy charged in the indictment was conspiracy to violate Section 841(a)(1), Title 21 of the United States Code, which reads as set forth elsewhere in these instructions.

[32] In order to find Garland Jeffers guilty under this charge, you will have to be convinced beyond a reasonable doubt of each of the following essential elements:

First: The defendant committed a violation of the Federal Narcotics laws;

Second: That said violation of the Federal Narcotics law by the defendant, Garland Jeffers, is a part of a continuing series of violations by said defendant of the Federal Narcotics laws which occurred from on or about November 1, 1971, through on or about the 18th day of March, 1974;

Third: That defendant, Garland Jeffers, undertook to commit such a series of offenses in concert with five or more persons;

[1065] Fourth: That the defendant, Garland Jeffers, occupied the position of organizer or supervisor or any

other position of management with respect to such five or more persons.

The fifth and last essential element is: Proof beyond a reasonable doubt that from the continuing series of violations, if such you find, the defendant, Garland Jeffers, obtained substantial income or resources.

[33] The term "conspiracy" as it applies to this case means a combination of, or agreement between, two or more persons by concerted action to accomplish a criminal or unlawful purpose. Formal agreement between the parties alleged to be members of a conspiracy is not essential to the formation of a conspiracy, but it is sufficient if there is a concert of action of all the parties working together, with a single design for the accomplishment of a common purpose or purposes. It is a joint understanding between two or more parties, each of whom knows what the understanding is and each of whom assents to it. A conspiracy may be complete whether the offense which the parties may have agreed or conspired to commit is committed or not.

While a conspiracy involves an agreement to violate the law, it is not necessary that the persons charged met together and entered into an express or formal agreement, [1066] or that they stated, in words or writing, what the scheme was or how it was to be effected or carried out. It is sufficient to show that they tacitly came to a mutual understanding to accomplish an unlawful act. Moreover, since a conspiracy is ordinarily characterized by secrecy, such an agreement may be inferred from the circumstances and conduct of the parties.

To be a member of the conspiracy a defendant need not know all the other members, nor all the details of the conspiracy, nor the means by which the objects were to be accomplished. Each member of the conspiracy may perform separate and distinct acts. It is necessary, however, that the Government prove beyond a reasonable doubt that the defendant in question was aware of the common purpose, and was a willing participant, with the intent to advance the purpose of the conspiracy. In determining whether the defendant was a member of the conspiracy, if any, you the jury should consider only his

acts and statements. The defendant cannot be bound by the acts or declarations of other participants until it is established, beyond a reasonable doubt, that a conspiracy existed and that he was one of its members.

The Government is not required to prove that each member of a conspiracy committed or participated in a particular act, since the act of anyone done in further-[1067] ance of the conspiracy becomes the act of all the co-conspirators.

The guilt of a conspirator is not to be governed by the extent or duration of his participation. Some may take major parts while others may play minor roles.

All the conspirators need not have originally conceived the conspiracy, nor have participated in it from its inception. Nor need they have taken part in every step or action in its furtherance. Nor is it necessary that every conspirator knew each separate act on the part of every other conspirator or had knowledge of all the operations of the conspiracy.

Even if one entered the conspiracy after it was formed or if he engaged in it to a degree more limited than that of his co-conspirators, he is equally culpable so long as he was in fact a member of the conspiracy and joined it knowingly and intentionally.

It is not necessary that the Government prove that the conspiracy existed over the entire course of time which is alleged in the indictment. The indictment alleges that the conspiracy began on November 1, 1971, and continued thereafter up to and including the 18th day of March, 1974. If you find, however, that within that period of time all of the essential elements of this crime have been proved beyond a reasonable doubt, then the crime of conspiracy [1068] is complete. In that event the fact that the Government did not show that the conspiracy began as early as November 1, 1971, or that it continued until March 18, 1974 would not, in and of itself, be of any importance as far as the essential elements of the crime are concerned.

It is not necessary that a party have knowledge of the existence of a conspiracy before he can become a party to it. A person who has no knowledge of a con-

spiracy, but happens to act in a way which furthers an object or purpose of a conspiracy, does not by such conduct become a conspirator. A party cannot knowingly participate in a conspiracy unless he is aware of it and acts in a common understanding with the other parties to further its purpose.

The burden is upon the Government to prove the existence of such a conspiracy beyond a reasonable doubt and also to prove in the same manner the knowledge of the defendant who is alleged to have joined therein.

[34] The one overt act the Government is required to prove beyond a reasonable doubt in regard to the conspiracy does not need to be an unlawful act. It need only be an act that is done in the Northern District of Indiana to further an alleged unlawful objective of the alleged conspiracy.

The overt act need be done by only one member of the alleged conspiracy. It is not necessary that other [1069] members of the alleged conspiracy knew about the act as long as the act is done by one of the members and in furtherance of an unlawful objective of the conspiracy and during its existence.

[35] Heroin is a Schedule I narcotic drug controlled substance as contemplated by the statute, previously quoted.

Cocaine is a Schedule II narcotic drug controlled substance as contemplated by the statute, previously quoted.

[36] An act is done "knowingly" when it is done with actual knowledge of the facts and with the purpose and intent of violating the law. Unless there is a purpose and intent to violate the law, an act is not done knowingly.

An act is done "willfully" if done intentionally and with an evil intent.

An act is done "unlawfully" if it is done contrary to the law.

[36A] The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

[1070] The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession as that term is used in these instructions is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others.

An act or failure to act is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

[37] I will now discuss in more detail and define for you the meaning of certain terms as used in the statute, Section 848, that I read to you and in these instructions relating to the five elements of the so-called continuing criminal enterprise charge.

First, you must determine, beyond a reasonable doubt, that the defendant, Garland Jeffers, is guilty of distribution of heroin or the possession of heroin with the intent to distribute and the distribution of cocaine or the possession of cocaine with the intent to distribute cocaine.

If you determine that the defendant did this, [1071] then you must determine, beyond a reasonable doubt, that the violations were part of a continuing series of violations of the Federal Drug Laws.

I charge you that the term "series" generally means three or more and that the term "continuing" means "during" "existing for a definite period" or intended to cover or apply to successive similar occurrences. Thus, you must find beyond a reasonable doubt that the defendant, Garland Jeffers, committed three or more successive violations of the Federal Drug laws over a definite period of time with a single or substantially simi-

lar purpose and within the period of time charged in the indictment.

Now, as to the third element or requirement, that is that the defendant, Garland Jeffers, committed these violations in concert with five or more persons.

The fourth element required is that if you find beyond a reasonable doubt that the defendant, Garland Jeffers, occupied a position of organizer, a supervisory position or any other position of management. An organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activities in one operation or enterprise. A supervisory position can be defined as meaning one who manages or directs or oversees the activities of others.

[38] With regard to the second element of proof here [1072] in the indictment, that is, proof of a continuing series of violations under the 1970 Drug Abuse Act, in simple terms, the United States contends from the evidence that it has shown a continuing series of transactions by Garland Jeffers substantially in the form of distribution and possession of heroin with intent to distribute same. You must be convinced beyond a reasonable doubt that such activities, if they occurred, were not sporadic and isolated in nature, but rather were part of an ongoing and connected pattern of activity engaged in by Garland Jeffers.

Now, let me discuss with you the fourth essential element. That is the one which requires proof beyond a reasonable doubt that Garland Jeffers is an organizer or manager or person in a supervisory position. Let me say that in this connection an organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activities in one essentially orderly operation or enterprise.

A supervisory position, as that phrase is used under the statute, can be defined as meaning one who manages or directs or oversees the activities of others.

[39] Now, let me take up with you some of the definitions which may be important under the fifth requirement or element that Mr. Garland Jeffers be shown to have obtained substantial income or resources from a con-

tinuing series of violations [1073] of the Drug Abuse Act of 1970.

First of all, I point out to you that in the context of this count and the underlying statute, "substantial" means something that is real or actual.

Furthermore, the word "substantial" connotes something having considerable or ample size or value.

Finally, I instruct you that the word "income" here can be simply defined as money or other material resources or property received or gained directly from illegal narcotics transactions by the defendant in question.

Incidentially, I instruct you also that it does not necessarily mean net income. That is to say, it could mean gross receipts or gross income.

From what I have already said, ladies and gentlemen of the jury, it would follow that the phrase "substantial income" in this kind of a charge should be construed as far as possible in an objective manner. That is to say, in order to support a conviction under this charge, you should find that Garland Jeffers received what any reasonable persons would consider to be considerable or ample funds from engaging in a continuing activity of distributing heroin as an organizer or supervisor or manager.

Put differently, it would be insufficient to support any conviction here if all you were to determine was that although Garland Jeffers was guilty as to the [1074] charge, he obtained only occasional moderate sums of money or resources in connection with any distribution of heroin.

[40] You are further instructed that it is not sufficient that the Government show that the "Family" organization received a large amount of gross receipts from the sale of drugs; the Government must prove, beyond a reasonable doubt, that the defendant, personally, received a large amount of money and that it was his and not the "Family's." In other words, before you may consider the monies in the defendant's possession as his income you must find beyond a reasonable doubt that the defendant received this income subject to his unfettered command and which he was free to enjoy at his option.

Before such monies received by Garland Jeffers can be considered his income, you must find beyond a reasonable doubt that Garland Jeffers was free to dispose of the money at his will.

[41] I want to impress upon you that you, the jury, are the sole judges of the facts from all of the evidence.

I, as presiding Judge, am charged with the duty of directing the trial along paths of recognized procedure.

In executing my duty, I may have said or done things during the course of this trial that some of you might interpret as my views on the weight of the evidence or the credibility of the witnesses if I were deciding the case. I request you to disregard such a conclusion [1075] as I intended only to decide questions of law and handle the procedure of the trial.

If I saw fit in some instances to ask questions of any witness, this must not influence you, but such witness and evidence must be considered by you like all other witnesses and evidence. Such conduct on my part does not indicate in any way that I have an opinion one way or the other as to the issues, facts, or credibility of the witness. What the weight of evidence is and the credit or belief is, to be given to each and all witnesses must be determined by you and you alone.

If I have said or done anything which has suggested to you that I am inclined to favor the claims of or positions of either side, you will not suffer yourselves to be influenced by any such suggestion. I have not expressed nor have I intended to express, any opinion as to what witnesses are or are not worthy of credence, and what inference or inferences should be drawn from the evidence adduced in this case.

[42] I instruct you that the matter of the punishment to be inflicted, if a verdict of guilty is reached, is not before you, the jury, but that this is a matter for the court to determine or fix. The only matter before you is the question of whether or not the defendant is guilty or innocent of the crime charged in the indictment.

[1076] [43] The verdict must represent the considered judgment of each juror. In order to return a verdict,

it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

[44] Upon retiring to the jury room, you will select one of your number to act as your foreman, and the foreman may be either male or female. The foreman will preside over your deliberations and will be your spokesman here in Court.

Forms of verdict have been prepared for your convenience, two of them. They read as follows: We the Jury find the Defendant Garland Jeffers not guilty as [1077] charged in the indictment. The other form reads: We the Jury find the Defendant Garland Jeffers guilty as charged in the indictment.

You will take these forms to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreman fill in, date, and sign the form to state the verdict upon which you unanimously agree as to the defendant, and then return with your verdicts to the Court.

Ladies and Gentlemen, for the last eight days you have been told that you were not permitted to discuss this case. The point in time has now arrived where it is your duty to discuss and determine this case. You may now retire and do so. The alternates will remain in the court room.

Swear the Bailiffs.

SUPREME COURT OF THE UNITED STATES

No. 75-1805

GARLAND JEFFERS, PETITIONER

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed October 4, 1976

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

SUPREME COURT OF THE UNITED STATES

No. 75-1805

GARLAND JEFFERS, PETITIONER

v.

UNITED STATES

ON CONSIDERATION of the motion of the petitioner for leave to proceed further herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

November 8, 1976

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 224082 19

No. 75-1805

In the Supreme Court of the United States

OCTOBER TERM, 1976

GARLAND JEFFERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 532 F. 2d 1101.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1976. A petition for rehearing was denied on May 18, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on June 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the Double Jeopardy Clause, petitioner's conviction of conspiracy to distribute narcotics barred his subsequent prosecution and punishment for engaging in a continuing criminal enterprise.

STATUTES INVOLVED

21 U.S.C. 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. 848 provides in pertinent part:

> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

STATEMENT

The evidence, as summarized by the court of appeals (Pet. App. 2-4), showed that petitioner was the head of a sophisticated narcotics distribution network that operated in Gary, Indiana, from January 1972 to March 1974. The organization, known as "the Family," was formed by petitioner and five others. Although petitioner initially served only as treasurer of the Family, he quickly assumed control and transformed the cooperative venture into his personal enterprise.

The Family distributed 1,000 to 2,000 capsules of heroin a day and had net receipts (after commissions to street distributors) of about $5,000 a day. The court of appeals estimated that petitioner's income from these operations during the two-year period exceeded $1 million (Pet. App. 4). To assure control over the narcotics distribution in Gary, the Family engaged in robbery and extortion of other drug dealers. Petitioner, in turn, maintained control over the Family by beating and shooting members who he determined should be disciplined.

In March 1974, indictments were returned in the United States District Court for the Northern District of Indiana charging petitioner with conspiring to distribute heroin and cocaine, in violation of 21 U.S.C. 846, and with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. The government sought to consolidate the two indictments for trial. Petitioner objected to consolidation on the ground, among others, that the two offenses were not the same and that consolidation would be prejudicial. The court ordered that the charges be tried separately (Pet. App. 5-6).

In June 1974, after a jury trial, petitioner and six co-defendants were convicted as charged under the conspiracy indictment. Petitioner was sentenced to fifteen years' imprisonment and three years' special parole and was fined $25,000. The court of appeals affirmed (520 F. 2d 1256).

In March 1975, after another jury trial, petitioner was convicted as charged under the continuing criminal enterprise indictment. He was sentenced to life imprisonment, to be served consecutively to his sentence

on the conspiracy conviction, and was fined $100,000. The court of appeals affirmed (Pet. App. A).

ARGUMENT

Petitioner's sole contention is that his prosecution and punishment for engaging in a continuing criminal enterprise was barred, under the Double Jeopardy Clause, by his previous conviction and sentence for conspiracy.[1] The contention rests on two premises: first, that "a conspiracy is a lesser included [offense] of a continuing criminal enterprise" (Pet. 13); second, that under the Double Jeopardy Clause "a conviction of a lesser included offense bars prosecution for the greater offense" (Pet. 8).

The court of appeals accepted the first premise (Pet. App. 7-8) but rejected the second (Pet. App. 11-19). It agreed that conviction of a lesser included offense ordinarily bars subsequent prosecution for the greater offense (Pet. App. 8-10). It held, however, relying on this Court's decision in *Iannelli* v. *United States*, 420 U.S. 770, that, "at least in the area of complex statutory crimes, if Congress intends that two offenses be retained as independent offenses, prosecution under both is permissible," even if one is included within the other (Pet. App. 11). Since Congress intended the offense of engaging in a continuing criminal enterprise to be "a substantially separate crime" from conspiracy (Pet. App. 18), the court concluded that petitioner's present

[1]Petitioner appears to object both to the second prosecution as such and to the cumulative nature of the punishment imposed on his second conviction. But since petitioner "objected strenuously" to the government's effort to consolidate the two indictments for trial, arguing that "conspiracy and continuing criminal enterprise were not 'the same' " (Pet. App. 6), he should not now be heard to complain that he was subjected to successive trials instead of only a single consolidated trial.

conviction was not barred by the prior conspiracy conviction (Pet. App. 19).

Like the court of appeals, we believe that *Iannelli* is controlling. In our view, however, that decision also requires rejection of petitioner's *first* premise—*i.e.*, that conspiracy is a lesser included offense of engaging in a continuing criminal enterprise. It is therefore unnecessary in this case to determine whether, in light of the congressional intent, the present prosecution would be permissible even if conspiracy *were* a necessarily included offense.

As petitioner acknowledges, the lesser included offense question turns on "whether or not a continuing criminal enterprise can be committed without a conspiracy" (Pet. 14). A person is engaged in a "continuing criminal enterprise" if he commits a federal narcotics felony and if the felony is part of a continuing series of federal drug violations "(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources." 21 U.S.C. 848(b). Petitioner argues that one cannot act "in concert with" (*ibid.*) other persons in such an enterprise without entering into a criminal conspiracy with them (Pet. 12-13).

Since "[t]he essence of the crime of conspiracy is agreement" *Iannelli* v. *United States*, *supra*, 420 U.S. at 785, n. 17, the validity of petitioner's argument depends on whether the phrase "in concert with" means "pursuant to an agreement with." In *Iannelli*, this Court found that the similar language of 18 U.S.C. 1955—which makes it a crime to operate an illegal gambling business that "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part

of such business"—does not require proof of an agreement among the participants (420 U.S. at 785, n. 17). Here, as in *Iannelli,* agreement is "an element not contained in the statutory definition of [the substantive] offense" (*ibid.*).

Although 21 U.S.C. 848(b) uses the phrase "in concert with five or more other persons," while 18 U.S.C. 1955 contains the phrase "involves five or more persons," the distinction is not significant here. Neither phrase requires proof of a conspiracy—*i.e.,* that there was a meeting of guilty minds. It is enough to show that the defendant acted with criminal intent, even if the other participants in the enterprise, with whom the defendant was acting "in concert," were innocent dupes unaware of the true criminal character of the enterprise.

In most cases, of course, the proof will show that the other participants themselves acted with criminal intent and that they were parties to a conspiracy with the defendant. But "the Court's application of the test focuses on the statutory elements of the offense," not on whether there is "a substantial overlap in the proof offered to establish the crimes." *Iannelli* v. *United States, supra,* 420 U.S. at 785, n. 17. So long as it is theoretically possible, as it is under 21 U.S.C. 848, to commit the substantive crime in the absence of a corrupt agreement, conspiracy is not a necessarily included offense. Since 21 U.S.C. 848, like 18 U.S.C. 1955, "pointedly avoids reference to conspiracy or to agreement" (*Iannelli, supra,* 420 U.S. at 789), there is no foundation for petitioner's contention that the former, unlike the latter, requires proof of a conspiracy.

It follows that petitioner was not twice put in jeopardy with respect to the same offense and that his prosecution and sentence for engaging in a continuing criminal

enterprise was not barred by his prior conviction and sentence for conspiracy.

Furthermore, the question whether one who engages in a continuing criminal enterprise necessarily commits a criminal conspiracy is not likely to be of recurring importance. This is, as far as we know, the only reported decision on the issue, and there is no reason to suppose that either successive prosecutions or cumulative punishments under the statutes involved here occur with any frequency.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1976.

DOJ-1976-09

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1805

GARLAND JEFFERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals is reported at 532 F.2d 1101, and is reprinted in Appendix A in the Petition for Writ of Certiorari.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Seventh Circuit was entered March 30, 1976. A Petition for Rehearing was denied on May 18, 1976. The Petition for a Writ of Certiorari was filed June 12, 1976. On October 4, 1976, the

Petition for Writ of Certiorari was granted. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

Amendment Five, Constitution of the United States of America:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

A law of the United States of America involving the crime of conspiracy, Title 21 U.S.C. §846:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

A law of the United States of America involving the crime of a continuing criminal enterprise, Title 21 U.S.C. §848:

> (a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years

> and which may be up to life imprisonment, to a fine not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).
>
> (2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States–
>
> (A) The profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.
>
> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if–
>
> (1) he violated any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter–
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position or organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.
>
> (c) In the case of any sentence imposed under this section, imposition or execution of such sentence

shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, sec 24-203 to 24-207), shall not apply.

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

QUESTION PRESENTED

Was the double jeopardy clause of the Fifth Amendment violated when the Court of Appeals, relying upon this Court's decision in *Iannelli v. United States*, 420 U.S. 770 (1975), held that there may be a conviction on a greater offense of a continuing criminal enterprise after a conviction on a lesser offense of conspiracy?

STATEMENT OF THE CASE

On March 18, 1974, Garland Jeffers was indicted in the Northern District of Indiana for two drug offenses. Jeffers was charged in Hammond Criminal 74-56 with conspiracy to distribute narcotics in violation of 21 U.S.C. §846 and in Hammond Criminal 74-57 with a continuing criminal enterprise in violation of 21 U.S.C. §848. These indictments were returned by the same grand jury. The indictments appear in the Appendix pp. 3-11.

On April 4, 1974, the Government filed a Motion for Trial Together of the two indictments and in support thereof alleged that the offenses "charged are of the same or similar character based on the same acts or transactions constituting parts of a common scheme or plan." See Government's Motion for Trial Together, Appendix pp. 12-14.

On April 29, 1974, all eight defendants in the conspiracy case, Hammond Criminal 74-56, filed objections to the trial together. See Appendix pp. 15-24.

On May 7, 1974, the trial court denied the Government's Motion for Trial Together.

In June, 1974, Jeffers and several others were convicted of conspiracy and Jeffers was sentenced to fifteen years. See Appendix, List of Important Dates, pp. 1-2.

On March 5, 1975, Jeffers attacked the pending criminal enterprise charge by filing a Motion to Dismiss which alleged double jeopardy in that Jeffers had been convicted of the lesser offense of conspiracy and therefore can't be tried on the greater offense of a criminal enterprise. See Appendix, pp. 25-32.

On March 10, 1975, the Government filed a response to the Motion to Dismiss (See Appendix pp. 33-36). The Government argued that since each offense was a distinct, separate and independent offense successive prosecutions were permissible.

On March 11, 1975, the trial court denied the Motion to Dismiss. See Appendix, List of Important Dates, etc. pp. 1-2. Jeffers was tried and convicted of a continuing criminal enterprise in March, 1975, and was sentenced to life.

The evidence presented at the conspiracy and the criminal enterprise trials differed only with regard to the proof that Jeffers received substantial income from the drug ring. The evidence was presented by several

co-conspirators and it showed that Garland Jeffers was the head of a narcotic drug ring in Gary, Indiana, from November, 1971, until March, 1974. the organization was called the "Family" and they attempted to control the drug traffic in Gary.

There has been no dispute that the conspiracy charge and the continuing criminal enterprise charge arose from the same criminal behavior of Jeffers. The Court of Appeals' opinion gives an accurate resume of the drug operations. See Petition for Writ of Certiorari, Appendix, A, pp. 2-4; *United States v. Jeffers*, 532 F.2d 1101, 1105-06.

SUMMARY OF THE ARGUMENT

Jeffers contends that a conspiracy to distribute narcotics, in violation of 21 U.S.C. §846, is a lesser included offense of a continuing criminal enterprise. The reason is that the definition of a continuing criminal enterprise, 21 U.S.C. §848, provides that there must be a series of drug violations "which are undertaken by such person *in concert* with five or more other persons." Jeffers argues that since concerted action is required there is, by definition, a conspiracy.

Jeffers contends that his multiple prosecutions violate the double jeopardy clause of the Fifth Amendment. That Jeffers' conviction on the lesser included offense of conspiracy bars his subsequent prosecution on the greater offense of a continuing criminal enterprise. The Double Jeopardy Clause prohibits successive prosecutions for the same crime, and that a lesser included prosecution bars the prosecution on the greater.

Jeffers argues that *Iannelli v. United States*, 420 U.S. 770 (1975) has been misinterpreted by the Seventh Circu *Iannelli* did not abolish the lesser included offense rule for determining the application of the

double jeopardy rule to complex statutory crimes. *Iannelli* was basically a punishment case; that is, separate punishments were permitted for a §371 conspiracy conviction and a §1955 gambling conviction. This Court specifically stated that these two crimes required different elements and the traditional *Blockburger* rule didn't apply. Jeffers argues that this case is a dual prosecution case, and that Congressional intent to punish must always be constrained by constitutional prohibitions.

Jeffers argues that there was no valid waiver of his double jeopardy rights. The objections to the trial together were based on an attempt to obtain a fair trial. Jeffers may not be forced to waive Fifth Amendment rights in seeking to exercise Sixth Amendment Rights to a fair trial.

ARGUMENT

A. Conspiracy is a lesser included offense to a continuing criminal enterprise.

The first determination that must be made is whether or not a conspiracy to distribute narcotics, chargeable under §846, is a lesser included offense of a continuing criminal enterprise. The statutory definition of a continuing criminal enterprise specifically requires that the person undertake his enterprise "in concert with five or more other persons." 21 U.S.C. §848(b)(2)(A). Webster's New Collegiate Dictionary, copywrited in 1974, defines "concert" as an "agreement in design and plan; union formed by mutual communication of opinion and views." If Jeffers is charged with running a drug ring while he is "in concert" with five or more other people, it would defy logic to say there is no agreement. If there is an agreement,

there is a conspiracy. Conspiracy can be defined as a combination between two or more persons by concerted action to accomplish a criminal or unlawful purpose. *Pinkerton v. United States*, 151 F.2d 499 (5th Cir.), affirmed 328 U.S. 640 (1946); *United States v. Amedeo*, 277 F.2d 375 (3rd Cir. 1960). In the continuing criminal enterprise trial, the court gave a conspiracy instruction that used this definition. See Court Instruction No. 33, Appendix pp. 46-48.

Since a continuing criminal enterprise requires proof of a conspiracy as one of its elements, Jeffers argues that this satisfies the traditional definition of a lesser included offense. Basically, there are two requirements to have a lesser included offense. First, the lesser offense involves fewer of the same constituent elements as the greater offense. See *Berra v. United States*, 351 U.S. 131 (1956) and *Sansone v. United States*, 380 U.S. 343 (1965). Secondly, the two offenses must contain common elements; that is, the greater offense cannot be committed without also committing the lesser. See *Olais-Castro v. United States*, 416 F.2d 1155 (9th Cir. 1969) and *Kelly v. United States*, 370 F.2d 227 (C.A.D.C. 1966), cert. denied, 388 U.S. 913. A continuing criminal enterprise requires an element of concerted action, i.e. conspiracy, and thus if the evidence proves a criminal enterprise a conspiracy must be proven. It is impossible to commit a continuing criminal enterprise without having a conspiracy.

It must also be noted that the Seventh Circuit expressly found that a conspiracy was a lesser included offense. The Seventh Circuit stated:

> Conspiracy to distribute narcotics falls within the definition of a lesser included offense of continuing criminal enterprise. The elements of a continuing criminal enterprise include, inter alia, that the accused engaged in a continuing series of violations of the Controlled Substances Acts which

> are undertaken *in concert* with five or more other persons with respect to whom the accused occupies some supervisory position. Since a criminal enterprise charge requires proof that the accused acted *in concert* with five or more persons, it requires proof of a conspiracy. (Emphasis in opinion; see Petition for Writ of Certiorari, Appendix A, pp. 7-8; *United States v. Jeffers*, 532 F.2d 1101, 1106-07.)

B. If a conspiracy is a lesser included offense Jeffers cannot be prosecuted on the lesser offense and then on the greater.

Jeffers' position is simply stated:

> . . . (A) conviction of a lesser offense bars a subsequent prosecution for a greater offense in all those cases where the lesser offense is included in the greater offense, and vice versa. 1 Wharton's Criminal Law and Procedure (Anderson, 1957), §135, pp. 294-295.

Jeffers is complaining he has been subjected to multiple prosecutions and that such prosecutions violate the double jeopardy clause of the Fifth Amendment. In *United States v. Ball*, 163 U.S. 662, at 669 (1896), this court said:

> The Constitution of the United States, in the Fifth Amendment, declares "nor shall any person be subject (for the same offense) to be twice put in jeopardy of life or limb." The prohibition is not against twice punished, but against being twice put in jeopardy.

This basic constitutional principle was rephrased by this Court in *Green v. United States*, 355 U.S. 184 at 187 (1957):

> The underlying idea, one that is deeply engrained in at least Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjected him to embarrassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, . . .

Petitioner would argue that this court has indicated that the lesser included offense rule is part of the double jeopardy protection. In *Robinson v. Neil*, 409 U.S. 505 (1973), this court was faced with a habeas corpus appeal. Robinson had been convicted of assault and battery in violation of a Chattanooga City Ordinance. Robinson was sentenced on this conviction. Subsequently Robinson was charged with assault with intent to murder and was tried, convicted, and imprisoned. Robinson sought a federal writ of habeas corpus challenging the second conviction as being in violation of his double jeopardy rights. When the case finally reached this Court, Robinson's claim was remanded to the district court for a determination if the charges were "the same" as required by the double jeopardy rule. It was obvious that the charges were not identical, that is, literally the same. The first conviction was for assault and battery, and the second was for assault with intent to murder. On remand, the district court made a detailed analysis of the standard to be applied in determining whether the charges were for the same offense. See *Robinson v. Neil*, 366 F.Supp. 924 (E.D. Tenn. 1973). The district court applied the "same evidence" test as adopted by this court in *Blockburger v. United States*, 294 U.S. 299 (1932). The rule set forth in *Blockburger* for determining if the offenses are the same is:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct

> statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.
>
> * * * * *
>
> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. (284 U.S. at 304)

The district court found that Robinson's second prosecution was double jeopardy; the court stated:

> In the present case, conviction of the greater offense requires proof of an additional fact, i.e., intent to commit murder, but, by definition, the lesser offense does not include an additional element. Bearing in mind that the "same evidence" test requires that each offense must entail the "proof of an additional fact which the other does not" to render the defense of double jeopardy unavailable, it becomes apparent that a conviction of a lesser included offense bars a subsequent prosecution for the greater offense. (Citation of authority omitted.)
>
> * * * * *
>
> As stated by Judge Miller in *United States v. Engle*, 458 F.2d 1021 at 1025 (6th Cir. 1972):
>
> "(The double jeopardy clause) is intended to prevent vexations, piecemeal prosecution whether the result of an intent to harass, a desire to have more than one shot at obtaining a conviction or severe sentence, a mere prosecutorial caprice or carelessness."
>
> If the State were allowed to initiate separate prosecutions against a defendant for every crime up the ladder from the lesser to the greater offense, the potential for abuse and oppression would be

too great to be tolerated in a society concerned for the rights of the individual. The double jeopardy clause stands as a bar to such a potential.

* * * * *

It is clear that the Constitution prohibits the trial of a person for the offense where he has been previously charged with and convicted of a lesser included offense arising out of the same act or activity.

* * * * *

The decision reached herein does not impose an undue hardship on the State. It merely requires that the prosecution of individuals accused of criminal activity be managed in such a way that those individuals are not forced to climb a ladder of multiple criminal prosecutions from the 'least' included offense to the greatest. *Robinson v. Neil*, 366 F.Supp. at 927, 928, 929.

Under the reasoning cited in *Robinson*, Jeffers argues that his conviction of conspiracy, as a lesser include offense, bars subsequent prosecution for a criminal enterprise.

C. Government has argued that the conspiracy and the substantial offense can be prosecuted separately.

The Government throughout this case has argued that there may be separate prosecutions for the conspiracy and the substantive offense. This rule and its rationale has been stated by this Court in *Pereira v. United States*, 347 U.S. 1 (1954):

> The Petitioners alleged that their convictions on both the substantive counts and the conspiracy to commit the crimes charged in the substantive counts constituted double jeopardy. It is settled

law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. *Only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy.* The substantive offenses with which petitioners were charged do not require more than one person for their commission; either could be accomplished by a single individual. The essence of the conspiracy charge is an agreement to use the mails to defraud and/or to transport in interstate commerce property known to have been obtained by fraud. *The defendants' conviction on the substantive counts does not depend on any agreement, he being the principal actor.* Thus the charge of conspiracy requires proof not essential to the convictions on the substantive offenses–proof of an agreement to commit an offense against the United States–and it cannot be said that the substantive offenses and a conspiracy are identical, any more than that two substantive offenses are identical. (Emphasis supplied) 347 U.S. at 11.

The policy reason for this rule is that most substantive offenses do not require a conspiracy as an essential element. This Court has acknowledged that if a substantive offense does in fact require a conspiracy, then there could not be multiple prosecutions. In *Pinkerton v. United States*, 328 U.S. 640 (1946), this court was faced with a question of whether multiple punishments could be imposed on convictions for conspiracy and the substantive offense. The *Pinkerton* court found multiple punishment permissible, but acknowledged that there could be a situation in which it would not be. The Court stated:

> Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. (Citations omitted; 328 U.S. at 643).

The basic policy reason for allowing separate prosecutions for the substantive crime and a conspiracy is that "collective criminal agreement–partnership in crime–presents a greater potential threat to the public than individual delicts." *Callanan v. United States*, 364 U.S. 587, at 593 (1961). "It has ingredients, as well as implications, distinct from the completion of the unlawful project." *Pinkerton v. United States*, supra, 328 U.S. at 644. "Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality." *Callanan v. United States*, supra, 364 U.S. at 593.

Jeffers argues that the multitude of cases permitting separate prosecutions and the policy reasons are not controlling. The reason is that none of these cases involved a substantive offense that required a conspiracy as an essential element. When Congress enacts a sanction for a crime that requires concerted activity, it should be presumed that Congress has taken into consideration the evils of the concerted activity. See 29 Southwestern Law Journal 783, at 784 (1975). Jeffers argues that the statutory scheme involved herein shows an intent that there should be one prosecution and punishment for a continuing criminal enterprise and its underlying conspiracy. Congress has provided harsh penalties for a continuing criminal enterprise thereby acknowledging the evils of the concerted action. For the first offense the defendant may be sentenced from

10 years to life, fined up to $100,000, and have the profits from the drug ring forfeited. See 21 U.S.C. §848(a). This is a much heavier penalty than is provided for conspiracy to distribute narcotics; this penalty is up to fifteen years. See 21 U.S.C. §841 and 846. It therefore follows that the continuing criminal enterprise penalty included the penalties for the underlying conspiracy. Thus, a conspiracy prosecution and penalty should not be added on the substantive crime. This rule has been tacitly approved by this Court. *Pinkerton v. United States*, 328 U.S. 640 (1946) and *Gebardi v. United States*, 287 U.S. 112 (1932). See also *United States v. Cogan*, 366 F.Supp. 374, at 377 (S.D.N.Y. 1967). When the penalties for the substantive offense are sufficient to cover an included conspiracy crime, there can not be separate prosecutions.

D. Iannelli v. United States has not created a new double jeopardy rule.

The Court of Appeals decision (Petition for Writ of Certiorari, Appendix A. pp. 11-19; *United States v. Jeffers*, 532 F.2d 1101, 1106-11) acknowledged the validity of the lesser included offense rule, but held that "this rather mechanical analysis" should not control the case. The Court of Appeals went on to make an analysis of *Iannelli v. United States*, 420 U.S. 770 (1975), finding that Iannelli had created a new criterion for double jeopardy. The Court of Appeals viewed Iannelli as allowing multiple prosecutions for highly complex statutory crimes without the restraints of the lesser included offense rule. The Court of Appeals stated:

> The double jeopardy contention (in Iannelli) was passed over in a footnote, id. at 785 n. 17, and the theme of the opinion (Iannelli) seems to be

that at least in the area of complex statutory crime, if Congress intends that two offenses be retained as independent offenses, prosecution under both is permissible. (532 F.2d at 1108.)

* * * * *

In regard to highly complex statutory crime, however, the included offense tests are often not appropriate to determine whether two offenses should be classed as "the same" because often, even though these offenses meet the included offense test, they are direct at quite different results. (532 F.2d at 1110.)

* * * * *

From this analysis, then, we conclude that the conspiracy charged in the first indictment and the continuing criminal enterprise charged in the second indictment were not the "same offense" for double jeopardy purpose, and a prior conviction in the first indictment did not bar prosecution on the second. (532 F.2d at 1111.) (Petition for Writ of Certiorari, Appendix A. pp. 11, 15, 18-19)

Jeffers argues that this Court's decision in Iannelli did not establish a new double jeopardy rule.

In *Iannelli* the question was presented of whether an individual could be convicted of a §371 conspiracy and a §1955 gambling offense. This Court discussed the traditional Wharton's Rule and whether it was applicable to Iannelli. The two prosecutions were permitted to stand. Petitioner points out that the §1955 gambling charge did not require a conspiracy. 18 U.S.C. §1955 defines an illegal gambling business; it "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business." See 18 U.S.C. §1955(b)(1)(ii). Since a conspiracy was not required in the gambling offense, the lesser included offense doctrine did not come into issue. The Court discussed this in detail:

The essence of the crime of conspiracy is agreement, see e.g., *Pereira v. United States*, 347 U.S. 1, 11-12 (1954); *Braverman v. United States*, 317 U.S. 49, 53 (1942); *Morrison v. California*, 291 U.S. 82, 92-93 (1934), an element not contained in the statutory definition of the §1955 offense. In a similar fashion, proof of violation of §1955 requires establishment of a fact not required for conviction for conspiracy to violate that statute. To establish violation of §1955 the prosecution must prove that the defendants actually did "conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business." 18 U.S.C. §1955(a). The overt act requirement in the conspiracy statute can be satisfied much more easily. Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy. See *Yates v. United States*, 354 U.S. 298, 333-334 (1957); *Braverman*, supra. (420 U.S. at 785, n. 17.)

* * * * *

But the §1955 definition of "gambling activities" pointedly avoids reference to conspiracy or to agreement, the essential element of conspiracy. Moreover, the limited §1955 definition is repeated in identifying the reach of §1511, a provision that specifically prohibits conspiracies. Viewed in this context, and in light of the numerous references to conspiracies throughout the extensive consideration of the Organized Crime Control Act, we think that the limited congressional definition of "gambling activities" in §1955 is significant. The Act is a carefully crafted piece of legislation. Had Congress intended to foreclose the possibility of prosecuting conspiracy offenses under §371 by merging them into prosecutions under §1955, we think it would have so indicated explicitly. It chose instead to define the substantive offense punished by §1955 in a manner that fails specifically to invoke the

concerns which underlie the law of conspiracy. (420 U.S. at 786.)

Thus in *Iannelli* dual convictions were permitted for the basic reason that the gambling violation did not require concerted action, and therefore the two crimes were separate and distinct.

The Court of Appeals in discussing *Iannelli* missed this finding. The Seventh Circuit felt that there had to be "some sort of concerted activity", and this would amount to a conspiracy. (Petition for Writ, Appendix A. p. 12; 532 F.d at 1108.) Also, the Court stated that "by a traditional analysis, the conspiracy charge is a lesser included offense of the substantive charge under §1955." (Petition for Writ, Appendix A., p. 13; 532 F.2d at 1109.) Jeffers argues that the Seventh Circuit's confusion on this point is the crux of this case. If *Iannelli* had specifically said that the lesser included offense rule was no longer valid then Jeffers would have no argument. *Iannelli* did not do so. Since it is clear that *Iannelli* did not find a conspiracy was a lesser offense of a §1955 gambling offense, there can be no valid claim that *Iannelli* created a new double jeopardy rule. Justice Powell in *Iannelli* acknowledged the limits of the case by commenting that the statutory elements of the crimes are the factors in determining whether the crimes are merged under the Wharton's rule or the same evidence test of *Blockburger*. (420 U.S. at 785, n. 17 and 18.) Jeffers argues that the Court of Appeals has improperly applied the *Iannelli* holding.

If the statutory elements of a continuing criminal enterprise are examined the requirement of concerted action is evident. 21 U.S.C. §848(b)(2)(A) defines a continuing criminal enterprise as a series of drug violations "which are undertaken by such person *in concert* with five or more other persons." This definition removes any question as to whether a

conspiracy is required. Congress, by adding the phrase "in concert", has made it clear that a continuing criminal enterprise involves a conspiracy. The conspiracy charge and the continuing criminal enterprise filed against Jeffers were made under the Drug Abuse, Prevention and Control Act of 1970.

Part D. of the Act provides for the legislative scheme of offenses and penalties. A brief outline of the various sections is:

§841–unlawful distribution–up to 15 years
§842–improper actions of a registrant - civil penalty
§843–improper distribution by a registrant; use of a forged prescription, etc., use of a communication facility to commit a felony - up to 4 years.
§844–simple possession - up to one year
§845–distribution to persons under twenty-one - up to 30 years
§846–conspiracy - up to maximum time for the offense
§847–additional penalties - all in addition to any other civil or administrative penalty
§848–continuing criminal enterprise - 10 years to life
§849–special drug offenders - up to 25 years
§850–information for sentencing
§851–proceedings to establish prior convictions

All of these laws were enacted in 1970 as Public Law 91-513. Jeffers argues that these sections show a stair step approach in drug offenses. The continuing criminal enterprise is the top of the offenses. A continuing criminal enterprise is simply a conspiracy that is super successful. The closeness of the conspiracy prohibition, §846, to the continuing criminal enterprise, §848, indicates the Congress was aware of both crimes and their definitions. In light of the statutory elements of a continuing criminal enterprise, the lesser included

offense rule would have to come into play. When Congress specifically included conspiracy in its definition, Jeffers is automatically protected from multiple prosecutions for conspiracy and a continuing criminal enterprise.

The Seventh Circuit attempted to avoid the lesser included offense rule by citing nebulous policy considerations. First, the Court contended that the complexity of criminal legislation warranted the abandonment of the constitutional protective. Petition for Writ of Certiorari, Appendix A, p. 15; *United States v. Jeffers*, 532 F.2d 1101, at 1110. No authority was cited. The Court of Appeals argued that the conspiracy and continuing criminal enterprise were aimed at different results and that this justified a double jeopardy change. A continuing criminal enterprise is different from a conspiracy in that it requires other elements in addition to concerted action. This does not mean that it is a different crime for purposes of determining double jeopardy rights. The statutory scheme outlined above does not make each crime a completely separate offense; that is, each crime does not have an element that the others do not. The statutory pattern is to provide heavier sanctions for the more serious drug offenders. But this must be done within the protections afforded by the double jeopardy clause. This court has already established a criterion for a double jeopardy determination and that is whether or not a continuing criminal enterprise can be committed without a conspiracy. To hold that this is not the criterion this Court would have to reverse *Blockburger* and subsequent cases. The Seventh Circuit's emphasis on the complexity of criminal legislation does not change the existing constitutional standard for double jeopardy.

The Seventh Circuit also justified an abandonment of the traditional double jeopardy rule because of the

difficulty prosecutors would have in knowing that crimes were included in others. The Court stated in a footnote:

> The included offense theories, if applied to complex statutory crimes, create hypertechnical classifications for offenses, which catch prosecutors off guard by holding offenses which would not normally be considered similar "the same." (Petition for Writ, Appendix A, p. 19, n. 12; 532 F.2d at 1111, n. 12.)

Petitioner argues that a prosecutor's ineptness is not justification for the abandonment of a constitutional right. Jeffers is still protected against the "embarrassment, expense, and ordeal" of successive trials. *Green v. United States*, 355 U.S. 184, at 187 (1957).

Finally, Jeffers would point out to this Court that this is not a case of multiple punishments but a case of multiple prosecutions. Jeffers suggests that congressional intent is the relevant inquiry on the question of multiple punishment, that is, did Congress sufficiently show indication that it desired punishment for both offenses. Congressional intent does not resolve multiple prosecution problems. Jeffers' multiple prosecutions must be reviewed in light of Fifth Amendment prohibitions and not congressional intent. Congressional intent may not supercede constitutional rights. *Iannelli* was a congressional intent case; Jeffers is a Fifth Amendment case. The Seventh Circuit has taken the position that congressional intent can abolish fundamental constitutional rights. This is not so. All criminal prosecutions are subject to the constraints of our constitution and these basic rights can not be legislated away.

E. Jeffers has not waived his double jeopardy rights by objections to a trial together.

Jeffers and the other defendants in the conspiracy case filed objections to the government's request to have the conspiracy and the continuing criminal enterprise charges tried together. The government has argued that this amounts to a waiver of Jeffers' constitutional right against double jeopardy. Jeffers contends that he was entitled to a full and fair trial. *Ponzi v. Fessenden*, 258 U.S. 254 (1922). Therefore, if Jeffers objected to the joint trial it was to perserve his constitutional right to a fair trial. Jeffers argues that he can't be required to waive one constitutional right in order to exercise another. The government would give Jeffers the choice between a prejudicial joinder in one trial, or multiple prosecutions. That is, Jeffers could avoid prejudicial joinder but would have to give up Fifth Amendment rights to do so.

This argument runs against this Court's ruling in *Simmons v. United States*, 390 U.S. 377 (1968). A defendant had filed a Motion to Suppress Evidence on the basis of a violation of Fourth Amendment rights. The defendant had to take the witness stand in order to establish his right to assert his Fourth Amendment rights. The defendant lost his pre-trial motion and his testimony was sought to be used against him at his trial. This Court held that when a defendant exercises a constitutional right, he cannot be held to have waived other constitutional rights. And therefore testifying at a Fourth Amendment hearing is not a Fifth Amendment waiver. This Court stated:

> . . . Thus, in this case Garrett (defendant) was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testified in support of a Motion to Suppress Evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection. (390 U.S. at 394, 88 S.Ct. at 976.)

Jeffers contends that *Simmons* prohibits a valid waiver; no penalty can be attached to the exercise of a constitutional protected right. *Simmons* has been followed in other circumstances. In *Davis v. Wainwright*, 342 F.Supp. 39 (M.D. Fla. 1971), the defendant was required to take the witness stand and make incriminating statements in order to obtain court appointed counsel. The Court in relying upon *Simmons* held there was no valid Fifth Amendment waiver because the Defendant was attempting to obtain the services of counsel. In *United States v. Harrison*, 461 F.2d 1127 (5th Cir. 1972) testimony given by a defendant at a pre-trial hearing on a Motion to Suppress a confession was held inadmissible at the trial. In *United States v. Sherpix, Inc.*, 512 F.2d 1361 (C.A.D.C. 1975), the Court held that an appearance at a prior adversary hearing on the issue of obscenity would not be admissible at the trial. Attempted protection of First Amendment rights will not waive Fifth Amendment rights. All of these cases prevent the waiver of valid constitutional rights by the exercise of other constitutional rights. Thus, Jeffers' attempt to obtain a fair trial cannot be held to waive his Fifth Amendment rights against double jeopardy.

Jeffers would further argue that waiver of constitutional rights is not lightly to be inferred; courts must indulge in every reasonable presumption against waiver

of fundamental constitutional rights. *Emspak v. United States*, 349 U.S. 190 (1955). There must be an intentional relinquishment of a known right before there can be a valid waiver. *Johnson v. Zerbst*, 304 U.S. 458 (1938). At the time Jeffers objected to the trial together there was no certainty that the government would proceed to try him in two trials. A waiver of Fifth Amendment rights simply cannot follow from these happenings.

CONCLUSION

Jeffers' conviction for a continuing criminal enterprise must be reversed as being in violation of the Fifth Amendment protection against double jeopardy.

Respectfully submitted,

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No. 75-1805

In the Supreme Court of the United States

OCTOBER TERM, 1976

GARLAND JEFFERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1976

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GARLAND JEFFERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 532 F. 2d 1101.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1976. A petition for rehearing was denied on May 18, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on June 12, 1976, and was granted on October 4, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause barred petitioner's prosecution and punishment for engaging in a continuing criminal enterprise following his conviction of conspiracy to distribute narcotics.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

21 U.S.C. 841 provides in pertinent part:

> (a) * * * it shall be unlawful for any person knowingly or intentionally—
>
> (1) to * * * distribute * * * a controlled substance * * *.
>
> (b) * * * any person who violates subsection (a) * * * shall be sentenced as follows:
>
> (1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both.

21 U.S.C. 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. 848 provides in pertinent part:

> (a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).
>
> (2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—
>
> (A) the profits obtained by him in such enterprise, and
>
> (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.
>
> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

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(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 * * * shall not apply.

STATEMENT

1. On March 18, 1974, petitioner and twelve other individuals were charged in a one-count indictment (A. 5–11) in the United States District Court for the Northern District of Indiana with conspiring over a two and a half year period to distribute heroin and cocaine, in violation of 21 U.S.C. 846. On that date petitioner was also separately indicted (A. 3–4) for having engaged during the same period in a continuing criminal narcotics enterprise, in violation of 21 U.S.C. 848. The government sought to consolidate the indictments for trial (A. 12–14). Petitioner objected to consolidation on the grounds, among others, that the two offenses were not the same and that consolidation would be prejudicial (A. 15–24). The district court denied the government's motion and ordered that the charges be tried separately (Pet. App. 5–6).

In June 1974, after a jury trial, petitioner and six co-defendants were convicted as charged under the

a massive scale (Tr. 229–232, 234–235, 348, 358, 397, 402).

conspiracy indictment. Petitioner was sentenced to 15 years' imprisonment, three years' special parole, and a fine of $25,000. The court of appeals affirmed, 520 F. 2d 1256, and this Court denied a petition for a writ of certiorari, 423 U.S. 1066.[1]

In March 1975, after another jury trial, petitioner was convicted as charged under the continuing criminal enterprise indictment. He was sentenced to life imprisonment, to be served consecutively to his sentence on the conspiracy conviction, and to a fine of $100,000.

2. The evidence at the second trial (summarized by the court of appeals at Pet. App. 2–4) showed that petitioner was the head of a sophisticated narcotics distribution network operating in Gary, Indiana, from January 1972 to March 1974 (Tr. 226–228, 345–346, 397–398). The organization, known as "the Family," was originally formed by petitioner and five others to steal or extort money and drugs from other narcotics dealers (Tr. 226–230, 345–346, 397–398). Under petitioner's direct supervision, however, the Family quickly expanded in membership and soon undertook to procure and distribute heroin on

[1] Petitioner and his co-defendants subsequently filed a motion pursuant to 28 U.S.C. 2255 to set aside their convictions in that case on the principal ground of ineffective assistance of counsel. The district court denied the motion and the court of appeals affirmed (C.A. 7, No. 76–1532, unpublished opinion dated November 24, 1976). A petition for review of that decision is now pending before the Court in No. 76–5974.

The Family distributed 1,000 to 2,000 capsules of heroin a day and had net receipts (after commissions to street distributors) of about $5,000 a day (Tr. 490–491, 535). The receipts were turned over to petitioner (Tr. 229–230, 248–249, 353–355, 403–404, 459–464). Although he initially served only as treasurer of the Family, petitioner in a short time assumed control and transformed the cooperative venture into his personal enterprise. The court of appeals estimated that his personal income from the narcotics distributions during the two-year period exceeded one million dollars (Pet. App. 4; see Tr. 311–313, 536). Beyond the amounts treated by petitioner as personal income, sufficient profits remained to enable him to pay Family members' salaries, apartment rental fees, and bail bond fees, and to purchase automobiles for some of them (Tr. 249–258, 315–318, 359, 363–365, 501–502, 796–799). Petitioner maintained control over the Family by beating and shooting members who he determined should be disciplined (Pet. App. 3–4; Tr. 272–275, 407–412, 440, 634–635).

The evidence regarding the criminal activities of the Family was substantially similar to the evidence adduced at the previous trial of petitioner and other Family members for conspiracy. By contrast, much of the evidence regarding petitioner's personal authority over the Family and the substantial income he derived from the narcotics trafficking—necessary elements of the continuing criminal enterprise of-

fense but not of the conspiracy—was brought out for the first time at the second trial.

3. The court of appeals affirmed petitioner's conviction, rejecting his argument that the prosecution and punishment for engaging in a continuing criminal enterprise was barred, under the Double Jeopardy Clause, by his previous conviction and sentence for conspiracy. The court believed that conspiracy is a lesser included offense of a continuing criminal enterprise (Pet. App. 7–8) and expressed the view that petitioner's conviction would have been reversed under what it considered to be traditionally established double jeopardy principles (*ibid.*).

But the court then held (Pet. App. 11) that *Iannelli* v. *United States,* 420 U.S. 770, had established "a new double jeopardy approach towards complex statutory crimes"—an approach that, in the court's view (Pet. App. 14–15), disregards earlier tests for identity of offenses and focuses instead on whether Congress intended the statutes in question to prohibit and punish different types of conduct. It concluded that under this new approach the second prosecution here was permitted. The court reviewed the legislative history of Sections 846 and 848 and determined (Pet. App. 15) that "[t]he crime of engaging in a continuing criminal enterprise is aimed at something much different than just punishing concerted drug violations [*i.e.,* conspiracies]." Conspiracy, said the court (*ibid.*), "is aimed at the evil of collective criminal agreement, and seeks to attack problems quite apart

from the evil of the underlying offense," whereas Congress' purpose in prohibiting a continuing criminal enterprise was "to severely punish those criminals who made a substantial living by violating the drug laws" (Pet. App. 16). The court concluded (Pet. App. 18; footnote omitted): "Congress did not intend that continuing criminal enterprise be just another degree of conspiracy, but intended that it be a substantially separate crime, an independent weapon in the government's arsenal in the war on illicit drugs."

The court accordingly held (Pet. App. 18–19) that conspiracy and engaging in a continuing criminal enterprise are not the same offense and that petitioner's conviction and punishment for both did not violate the Double Jeopardy Clause.

SUMMARY OF ARGUMENT

In Part I of our brief we show that this case involves multiple prosecutions only, raising no meaningful issue of double punishment. Thereafter we make alternative arguments, either of which, if accepted, is sufficient to support affirmance of the judgment below. In Part II we contend that conspiracy is not a lesser included offense of a continuing criminal enterprise. In Part III we argue that, even if it is, the prosecution for the continuing criminal enterprise was permitted because the Double Jeopardy Clause does not generally bar prosecution for a greater offense following conviction of a lesser included offense. At the very least, prosecution for the greater offense following conviction of the lesser is permitted whenever the separate trials result from the defendant's

insistence (as here) or from the government's inability for any legitimate reason to try both offenses simultaneously in one trial.

I

Petitioner's sentence to life imprisonment for the continuing criminal enterprise offense removes from this case any question whether that sentence and petitioner's 15-year sentence for conspiracy amount to double punishment. Petitioner is not eligible for parole at any time under the continuing criminal enterprise sentence (21 U.S.C. 848(c)), and therefore even if he has been sentenced twice for the same offense and would in theory be entitled to vacation of the sentence for conspiracy, the multiple punishment has no practical significance. We accordingly agree with petitioner (Br. 7, 21) that the issue of multiple punishment is not presented in this case, and that the question for decision is whether the prosecution and *any* punishment for the continuing criminal enterprise violated petitioner's rights under the Double Jeopardy Clause.

II

A. We submit that *Iannelli* v. *United States,* 420 U.S. 770, controls this case. There the defendants were convicted of and sentenced cumulatively for engaging in an illegal gambling business, in violation of 18 U.S.C. 1955, and for conspiring to commit that offense, in violation of 18 U.S.C. 371. This Court ruled that the consecutive sentences were proper for the reason, *inter alia*, that the conspiracy was not a

lesser included offense of the substantive violation under the *Blockburger* test of "whether each provision requires proof of a fact which the other does not" (*Blockburger* v. *United States*, 284 U.S. 299, 304). The Court noted (420 U.S. at 785 n. 17) that "[t]he essence of the crime of conspiracy is agreement, * * * an element not contained in the statutory definition of the § 1955 offense. In a similar fashion, proof of violation of § 1955 requires establishment of a fact [*i.e.*, that the defendants actually conducted an illegal gambling business] not required for conviction for conspiracy to violate that statute."

The offenses here, like the offenses in *Iannelli*, are not necessarily the same. A criminal agreement—"[t]he essence of the crime of conspiracy"—will not always be an essential element of a continuing criminal enterprise violation, any more than it is an essential element of the Section 1955 offense charged in *Iannelli*. That Section makes it a crime to operate an illegal gambling business that "involves five or more persons," while Section 848 prohibits continuing narcotics violations undertaken "in concert with five or more other persons." The minor difference in phraseology does not mean that Congress intended the latter provision to require proof of a meeting of guilty minds but not the former, and accordingly under the *Blockburger* test conspiracy is not necessarily a lesser included offense of a continuing criminal enterprise. The legislative history of the Act and the decisions of the courts of appeals support this conclusion.

B. Although it is therefore possible to engage in a continuing criminal enterprise without also participating in a conspiracy, we note that in any particular case a conspiracy may in fact be necessarily included in the continuing enterprise charged. This seeming paradox comes about by virtue of the distinctive nature of the offense proscribed by Section 848, an offense in some respects quite unlike the single-transaction crimes in connection with which much of the jurisprudence of the Double Jeopardy Clause has evolved.

To convict of the crime of engaging in a continuing criminal enterprise, the government must prove (Section 848(b)) that the defendant has violated a felony provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970 and that the violation

> * * * is a part of a continuing series of violations of [the Act]—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom [the defendant] occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which [the defendant] obtains substantial income or resources.

Thus, proof of a continuing criminal enterprise requires proof of some number of independent violations of the Act, and the continuing enterprise may therefore be said to have lesser offenses necessarily included within it. No particular underlying violation

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fits the traditional definition of a necessarily included offense, however, since the continuing enterprise may have been committed (and be proved) by means of any number of other independent violations. But since some underlying violations must be proved, those that the government charges are, at least in one sense, "lesser included" offenses.

It follows that, if a conspiracy is one of the underlying violations charged, it may constitute a lesser included offense of the continuing criminal enterprise. In this case, however, since the underlying violations charged to prove petitioner's continuing criminal enterprise violation were substantive offenses (see A. 3), the conspiracy for which petitioner was first convicted was not a lesser included offense of the continuing criminal enterprise of which he was subsequently convicted.

III

A. Should the Court disagree with us and rule that the conspiracy was necessarily included in the continuing criminal enterprise, we submit that the successive prosecutions were nevertheless permissible under the Double Jeopardy Clause. In the first place, they came about only because of petitioner's insistence—contrary to the position he now asserts—that the offenses charged were different and could not be tried together. But if the conspiracy charged was a lesser included offense of the continuing enterprise, then the government was right in seeking to try the indictments together, and petitioner's success in urging

their severance should not now immunize him from prosecution on the greater offense any more than a mistrial granted at the defendant's request or a successful appeal by the defendant of his conviction confers immunity from reprosecution.

B. In any event, it does not violate the Double Jeopardy Clause for the government to prosecute a defendant for a greater offense after having successfully prosecuted him on a lesser included offense, so long as he was not in jeopardy on the greater offense at the first trial and is not placed in jeopardy again on the lesser included offense at the second trial. Thus, in *Diaz* v. *United States,* 223 U.S. 442, this Court held that a prosecution for murder was not barred by the defendant's prior conviction for assault where the victim had died following the first conviction and the defendant had not previously been in jeopardy for the murder. "[A]ll that could be claimed for [the jeopardy at the first trial]," said the Court (*id.* at 449), "was that it protected the accused from being again prosecuted for the assault and battery, and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide, as otherwise might have been done * * *."

In the present case, petitioner was not in jeopardy on the continuing criminal enterprise charge during his conspiracy trial, nor was he in jeopardy on the conspiracy charge (which was not treated as a lesser included offense) during the continuing enterprise trial. Since he was never placed twice in jeopardy for

the same offense, it follows that the successive trials were not barred by the Double Jeopardy Clause. And although successive prosecutions that pass muster under the Double Jeopardy Clause might in some circumstances be so unfair as to violate due process, in this case, where save for petitioner's insistence there would have been one trial rather than two, the government's conduct was not unfair at all.

Even if the Court should not agree that the Double Jeopardy Clause always permits prosecution of the greater offense following conviction on the lesser (provided that the defendant is not in jeopardy for both offenses at either trial), we submit that, at the very least, it allows subsequent prosecution on the greater offense whenever for legitimate reasons the government could not have charged that offense at the time of the trial of the lesser. See Friedland, *Double Jeopardy* 192 (1969); Note, *Twice in Jeopardy,* 75 Yale L.J. 262, 295 (1965); cf. *Blackledge* v. *Perry,* 417 U.S. 21, 29 n. 7; *Ashe* v. *Swenson,* 397 U.S. 436, 453 n. 7 (Brennan, J., concurring); *United States* v. *Jamison,* 505 F. 2d 407, 416–417 (C.A.D.C.).

In this case the government was prevented from trying the two indictments together by order of the district court, and in these circumstances the subsequent prosecution for the continuing criminal enterprise violated none of the policies protected by the Double Jeopardy Clause. It was not brought to harass petitioner or—petitioner never having been in jeopardy for the continuing criminal enterprise violation—to seek a conviction for a crime of which petitioner had earlier been acquitted or convicted. Petitioner was not placed twice in jeopardy of conviction for the conspiracy, since it was properly not considered a lesser included offense at the trial for the continuing criminal enterprise violation. *Diaz* v. *United States, supra,* 223 U.S. at 449. And finally, for the reasons earlier stated, petitioner has not been punished separately—in any meaningful way—for both the lesser and the greater offenses, since the maximum sentence he received for the greater offense leaves the sentence he received for the lesser offense with no practical effect.

c. *Waller* v. *Florida,* 397 U.S. 387, does not forbid the result we seek. In that case the issue was whether the petitioner could be prosecuted in state court for the same offense for which he had previously been convicted in municipal court. In holding that the municipality and the State were not different sovereigns for purposes of the Double Jeopardy Clause, the Court did not focus on the relationship between the lesser and greater offenses that were there assumed to have been the same offense and did not decide whether prosecution on a greater offense is permissible when for legitimate reasons it could not have been charged at the time of trial of the lesser included offense. See *Culberson* v. *Wainwright,* 453 F. 2d 1219, 1220 (C.A. 5).

ARGUMENT

I. THE SENTENCES IMPOSED ON PETITIONER FOR BOTH THE CONSPIRACY AND THE CONTINUING CRIMINAL ENTERPRISE DO NOT SUBJECT HIM TO IMPERMISSIBLE DOUBLE PUNISHMENT

At his first trial petitioner was convicted of a violation of 21 U.S.C. 846, which provides that "[a]ny person who * * * conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the * * * conspiracy." The crime charged and proved was conspiracy to distribute narcotics (Pet. Br. 4). Distribution of narcotics is an offense under Section 841(a), the punishment for which is imprisonment not to exceed 15 years, a fine of not more than $25,000, or both. 21 U.S.C. 841(b). For the conspiracy conviction petitioner was sentenced to 15 years' imprisonment and a fine of $25,000.

A continuing criminal enterprise violation carries with it (for a first offender) a minimum penalty of ten years' imprisonment and a maximum penalty of life imprisonment and a fine up to $100,000. 21 U.S.C. 848(a).[2] For his conviction of that offense, at the conclusion of his second trial, petitioner was sentenced to a fine of $100,000 and to life imprisonment, to be

[2] That Section also provides for forfeiture of the defendant's profits derived from the criminal enterprise as well as any interest in, claim to, or contractual or property rights affording a source of influence over the enterprise. 21 U.S.C. 848(a)(2).

served consecutively to the 15-year sentence for the conspiracy.

If, as we contend below, in certain circumstances the Double Jeopardy Clause allows prosecution and punishment for a greater offense after conviction and sentence on a lesser included offense, then cases may arise in which, in order to avoid multiple punishments for the same offense, it will be necessary in fixing the sentence on the greater offense to take into account any sentence already imposed on the lesser (as, for example, by crediting any time already served for the lesser offense against the time to be served for the greater). See Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 289 n. 128 (1965).

But that issue does not arise in this case, even assuming that conspiracy is a lesser included offense of engaging in a continuing criminal enterprise, for petitioner is not eligible for parole under the continuing criminal enterprise sentence. 21 U.S.C. 848(c).[3] If that sentence is valid, he will spend the remainder of his life in prison, and whether the 15-year sentence

[3] That Section provides that "[i]n the case of any sentence imposed under this section, * * * section 4202 of Title 18 * * * shall not apply." Before its repeal by the Parole Commission and Reorganization Act, Pub. L. 94-233, 90 Stat. 219 (to be codified at 18 U.S.C. (1976 ed.) 4201-4218), Section 4202 was the principal parole eligibility provision for federal prisoners. Section 4205 is the relevant provision of the new Act, which preserves the no-parole stricture of Section 848(c). See 18 U.S.C. (1976 ed.) 4205(h) ("Nothing in this chapter shall be construed to provide that any prisoner shall be eligible for release on parole if such prisoner is ineligible for such release under any other provision of law") and 4205(a) (providing for parole eligibility "except to the extent otherwise provided by law").

on the conspiracy conviction amounts to impermissible cumulative punishment is of only abstract interest. There is no way to "credit" petitioner's 15-year sentence against his no-parole life sentence. Nor would the effect on petitioner have been any different had the two sentences been made to run concurrently rather than consecutively—or, indeed, had no sentence at all been imposed for the conspiracy. And even if the conspiracy for which petitioner was convicted was a necessarily included offense of the continuing criminal enterprise, with the result that the first conviction itself should, in the abstract, be vacated (see *Fuller* v. *United States,* 407 F. 2d 1199, 1233 n. 52 (C.A.D.C.) (*en banc*), certiorari denied, 393 U.S. 1120), that conviction can have no practical adverse impact on petitioner, since it will never be taken into account in determining his parole eligibility and since, even if it caused him to be sentenced for some other offense as a multiple offender, no meaningful additional sentence can ever be imposed on petitioner. Cf. *Benton* v. *Maryland,* 395 U.S. 784, 790–791.

We therefore agree with petitioner (Br. 21) that "this is not a case of multiple punishments." The critical issue, rather, is whether the Double Jeopardy Clause was offended by petitioner's prosecution and receipt of any punishment for the continuing criminal enterprise violation.

II. *IANNELLI* V. *UNITED STATES* CONTROLS THIS CASE

A. The defendants in *Iannelli* v. *United States,* 420 U.S. 770, were convicted and some of them were cumulatively sentenced [4] for conspiring, in violation of 18 U.S.C. 371,[5] to violate 18 U.S.C. 1955, and for violating Section 1955 itself.[6] They argued unsuccessfully that, since Section 1955 defines an "illegal gambling business" to mean one that *inter alia* "involves five or more persons," prosecution and punishment for conspiracy to commit that crime were forbidden by Wharton's Rule, "an exception to the general principle that a conspiracy and the substantive offense that is its immediate end do not merge upon proof of the latter" (420 U.S. at 781–782).

Although he invokes *Blockburger* v. *United States,* 284 U.S. 299, rather than Wharton's Rule, petitioner

[4] See 420 U.S. at 772 n. 4.

[5] Section 371, the general conspiracy statute, provides in pertinent part:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[6] Section 1955 provides in pertinent part:

"(a) Whoever conducts * * * an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

"(i) is a violation of the law of a State or political subdivision in which it is conducted;

"(ii) involves five or more persons who conduct * * * such business; and

"(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

makes essentially the same argument.[7] A continuing criminal enterprise is defined (21 U.S.C. 848(b)) as a series of felony violations by the defendant of the Comprehensive Drug Abuse Prevention and Control Act of 1970 that are *inter alia* "undertaken * * * in concert with five or more other persons."[8] Petitioner contends (Br. 7–9), as did the defendants in *Iannelli* with regard to the "involv[ing] five or more persons" language of Section 1955, that this statutory definition of a continuing criminal enterprise necessarily involves proof of a conspiracy—*i.e.*, that the continuing crime is impossible to commit without commission of conspiracy as well. He concludes that conspiracy is a lesser included offense of a continuing criminal enterprise and that therefore his prosecution for the latter after his conviction on the former violated the Double Jeopardy Clause.

Although the court of appeals accepted (Pet. App. 7–10) petitioner's first premise—that conspiracy is a lesser included offense of a continuing criminal enterprise—we believe that this Court should reject it upon the authority of *Iannelli*.[9] In that case the Court noted (420 U.S. at 785 n. 17) that, as a test for determining whether two statutes proscribe the same or different offenses, "*Blockburger* requires that courts examine the [statutes] to ascertain 'whether each provision requires proof of a fact which the other does not.' [284 U.S.] at 304." The Court then applied that test to the offenses proscribed by 18 U.S.C. 371 and 1955. In language particularly relevant here (420

[7] Wharton's Rule "is essentially an aid to the determination of legislative intent" (*Iannelli* v. *United States*, *supra*, 420 U.S. at 786), and "[t]he test articulated in *Blockburger* * * * serves a generally similar function" (*id.* at 785 n. 17). In our view, the result in this case should be the same whether the double jeopardy issues are analyzed under the rubric of Wharton's Rule or the lesser included offense doctrine. (Indeed, in our brief in *Iannelli* we urged that Wharton's Rule is simply a specific application of the lesser included offense doctrine to conspiracy cases.) Thus, although petitioner's arguments could be said to invoke Wharton's Rule, he treats this case as one arising under the lesser included offense doctrine—as did the court below—and for the sake of consistency we do the same.

[8] Section 848(b) provides that a person is engaged in a continuing criminal enterprise if—

"(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

"(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

"(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

"(B) from which such person obtains substantial income or resources."

[9] In *Iannelli* the defendants were convicted of both conspiracy and the substantive offense in one trial, but that does not diminish the relevance of that case here, for the Court's holding that the offenses were separate for purposes of punishment necessarily meant that they were separate for purposes of successive prosecutions as well. Indeed, the Court found that Congress had intended, not "to foreclose the possibility of *prosecuting* conspiracy offenses under § 371 by merging them into *prosecutions* under § 1955" (420 U.S. at 789; emphasis added), but "to retain each offense as an 'independent curb' available for use in the strategy against organized crime. *Gore* v. *United States*, 357 U.S. 386, 389 (1958)" (420 U.S. at 791).

U.S. at 785 n. 17; some citations omitted), it found the offenses to be different:

> As *Blockburger* and other decisions applying its principle reveal, see, *e.g., Gore* v. *United States,* 357 U.S. 386 (1958); *American Tobacco Co.* v. *United States,* 328 U.S. 781, 788–789 (1946), the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. See *Gore* v. *United States, supra.* We think that the *Blockburger* test would be satisfied in this case. The essence of the crime of conspiracy is agreement, * * * an element not contained in the statutory definition of the § 1955 offense. In a similar fashion, proof of violation of § 1955 requires establishment of a fact not required for conviction for conspiracy to violate that statute. To establish violation of § 1955 the prosecution must prove that the defendants actually did "conduct * * * an illegal gambling business." § 1955(a). The overt act requirement in the conspiracy statute can be satisfied much more easily. Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy.[10]

[10] Since in *Iannelli* the Court found that under the *Blockburger* test a Section 371 conspiracy is not a lesser included offense of a Section 1955 illegal gambling violation, we agree with petitioner (Br. 18) that the court below misconstrued that decision in reading it to have declared (Pet. App. 11) "a new double jeopardy approach towards complex statutory crimes." *Iannelli* did not address or decide whether (as we urge in Part III of our brief) in some cases prosecution for a greater offense is permissible following conviction and sentencing for a lesser included offense.

So in the present case an agreement is not an essential element contained in the statutory definition of a Section 848 offense. Although that Section uses the phrase "in concert with five or more other persons," while 18 U.S.C. 1955 contains the phrase "involves five or more persons," the distinction is not significant here. Neither phrase requires proof of a meeting of guilty minds. It is enough to show that the defendant acted with criminal intent, even if the other participants in the enterprise, with whom the defendant was acting "in concert," were innocent dupes unaware of the true criminal character of the enterprise."

B. The structure and legislative history of the Act make it clear (as the court of appeals correctly determined (Pet. App. 15–18)) that Congress meant Section 848 to be "an independent weapon in the government's arsenal" to combat large-scale drug violations. The Comprehensive Drug Abuse Prevention and Control Act of 1970 represented a major effort by Congress to reform the heterogeneous body of federal narcotics laws. Both chambers held extensive hearings on the subject, culminating in passage of S. 3246 by the Senate and of H.R. 18583 by the House. See S. Rep. No. 91–613, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 91–1444, 91st Cong., 2d Sess. (1970).

[11] Thus, for example, a narcotics distributor who employed legitimate messenger services to deliver his narcotics could not escape conviction under Section 848 by showing that the messengers were unaware of the true contents of the packages they delivered.

Both bills reflected Congress' effort to distinguish among different drug offenses meriting different sanctions. At one end of the spectrum was occasional use of marijuana; at the other, large-scale trafficking in narcotics. For all but the most serious offenses mandatory minimum sentences were considered an impediment to rehabilitation and were accordingly eliminated. But for "*major* distribution, sale, and importation of" narcotics by professional criminals (S. Rep. No. 91-613, *supra,* at 7; emphasis added)—*i.e.,* for continuing criminal enterprises—both bills provided a mandatory minimum term of imprisonment and a maximum term of life.

H.R. 18583 was ultimately enacted into law. In its original form it (like S. 3246) treated the continuing enterprise provisions not as a separate offense but as an enhanced sentencing measure that came into effect only after conviction of some independent violation of the Act and upon the government's proof by a preponderance of the evidence, adduced at a post-trial, pre-sentencing hearing, that the defendant had been involved in large-scale, continuing narcotics activity.[12] In the House Committee on Interstate and

[12] Following hearings on several related bills, the House Subcommittee on Public Health and Welfare introduced H.R. 18583 as a clean bill and forwarded it to the House Committee on Interstate and Foreign Commerce (H.R. Rep. No. 91-1444, *supra*, at 1-2).

Since the bill appears in H.R. Rep. No. 91-1444 only in its amended form, we have lodged with the Clerk of this Court a copy of H.R. 18583 as it was originally placed before the Committee.

Foreign Commerce, however, the bill was amended (the "Dingell amendment," so-called because Congressman Dingell was its principal sponsor) to add what is now Section 848, making the continuing criminal enterprise "a new and distinct offense with all its elements triable in court" (H.R. Rep. No. 91-1444, *supra*, at 84 (Additional views)).

On the floor of the House another amendment, offered by Congressman Poff, restored to the bill a provision for enhanced sentencing. 116 Cong. Rec. 33628-33630 (1970). That provision—which is now Section 849 of Title 21—explicitly states that a showing that the defendant has participated in a conspiracy to engage in a pattern of narcotics dealing will subject him to additional punishment.[13] Congressman Eckhardt opposed the amendment, arguing that the Dingell amendment, which "created a new offense" (*id.* at 33302),[14] was to be preferred over a post-trial procedure allowing for enhanced sentencing. Congressman Poff acknowledged that Section 848 "em-

[13] Section 849(e) defines a special drug offender who is subject to enhanced punishment as one, *inter alia*, who has committed a felonious violation of the Act and——

"such felonious violation was, or the defendant committed such felonious violation in furtherance of, a *conspiracy* with three or more other persons to engage in a pattern of dealing in controlled substances which was criminal under applicable laws of any jurisdiction, and the defendant did, or *agreed* that he would initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or dealing * * *." (Emphasis added.)

[14] See also *id.* at 33627 (Dingell amendment "proposed a new section" and makes a continuing criminal enterprise "an individual, separate, provable crime").

bodies a new separate criminal offense with a separate criminal penalty" (*id.* at 33631) and explained that his amendment, in contrast, "[did] not define a separate criminal offense" (*ibid.*), but was intended, rather, "to give the prosecution the option of" pursuing either conviction "of a separate crime with separate penalties" or "the imposition of larger sentences upon [defendants] convicted first of the basic crime and then shown to be dangerous offenders" (*id.* at 33630).

The foregoing indicates that Congress advisedly created in Section 848 an offense that was not meant to subsume any other, including conspiracy, elsewhere outlawed in the Act. When Congress meant to forbid a conspiracy, it did so expressly in Section 846. When it intended conspiracy to be relevant to the issue of punishment, it said so expressly in Section 849. In short, "Congress manifested its clear awareness of the distinct nature of a conspiracy" (*Iannelli* v. *United States, supra,* 420 U.S. at 788), yet in Section 848 "pointedly avoid[ed] reference to conspiracy or to agreement, the essential element of conspiracy" (*id.* at 789). It follows that "[h]ad Congress intended to foreclose the possibility of prosecuting conspiracy offenses under [Section 846], * * * it would have so indicated explicitly. It chose instead to define the substantive offense punished by [Section 848] in a manner that fails specifically to invoke the concerns which underlie the law of conspiracy" (*ibid.*).[15]

[15] See also *United States* v. *Bommarito*, 524 F.2d 140 (C.A. 2), where the defendant argued that Wharton's Rule precluded his conviction for conspiracy under Section 846 on the ground that the sale of narcotics for which he was also convicted could not have been accomplished without the aid of his co-conspirator. The court noted (*id.* at 144, citing H.R. Rep. No. 91–1444, *supra*, at 10–11) that the purpose of the Act was to provide " 'more effective means for law enforcement aspects of drug abuse prevention and control' " and concluded (*ibid.*) that "[i]n view of Congress' obvious concern with the dangers posed by organized schemes to distribute drugs [citing Sections 848 and 849] and the careful consideration it gave to the Act's scheme of penalties, we believe that if it had intended to restrict the scope of § 846 through the application of Wharton's Rule, it would have done so explicitly." See also *Curtis* v. *United States*, C.A. 2, No. 76–3617, decided February 10, 1977.

C. Decisions of the courts of appeals support our position. In *United States* v. *Papa,* 533 F. 2d 815 (C.A. 2), certiorari denied, November 15, 1976 (No. 76–5073), the defendant argued that his prosecution in the Southern District of New York for a conspiracy in violation of Section 846 was barred on double jeopardy grounds by an earlier plea bargain he had made in the Eastern District of New York disposing of a continuing criminal enterprise charge under Section 848. In rejecting his claim the Second Circuit said (*id.* at 823):

> This Court has recognized that prosecution under section 848 is distinct and separate from a prosecution for the conspiracy and substantive offenses that may constitute some of the evidence offered on a continuing criminal enterprise count. *United States* v. *Sperling,* [506 F. 2d 1323 (C.A. 2), certiorari denied, 420 U.S. 962] (Sperling convicted of separate substantive, conspiracy, and section 848 offenses); *United States* v. *Sisca,* [503 F. 2d 1337 (C.A.

2), certiorari denied, 419 U.S. 1008] (appellant Abraham convicted of separate conspiracy and section 848 offenses); *United States* v. *Manfredi,* [488 F. 2d 588 (C.A. 2), certiorari denied, 417 U.S. 936] (appellant LaCosa convicted of separate substantive, conspiracy, and section 848 offenses).

Similarly, in the Fifth, Sixth, and Eighth Circuits defendants have been convicted of both a narcotics conspiracy and a continuing criminal enterprise. *United States* v. *Cravero,* 545 F. 2d 406 (C.A. 5); *United States* v. *Collier,* 493 F. 2d 327 (C.A. 6), certiorari denied, 419 U.S. 831; *United States* v. *Kirk,* 534 F. 2d 1262 (C.A. 8), pending on petition for a writ of certiorari, No. 75–7001. And the Fourth Circuit, while characterizing a continuing criminal enterprise as "a type of conspiracy," has expressly authorized prosecution under Section 848 following a conviction for conspiracy under Section 846. *United States* v. *Johnson,* 537 F. 2d 1170, 1175 (C.A. 4).

D. Congress in Section 848 created an unusual offense, one that does not fit comfortably into the mold of conventional double jeopardy analysis. Thus, although (as we have shown) Congress did not intend as a general matter that a prosecution for conspiracy would bar a later prosecution for a continuing criminal enterprise, we note that in a particular case a conspiracy might be a lesser included offense—albeit of an usual character—of a continuing enterprise.

One offense is necessarily included in another "if it is impossible to commit the greater without also

having committed the lesser." 2 Wright, *Federal Practice and Procedure—Criminal* § 515, p. 372 (1969). In the typical case a single act of the defendant's constitutes both the greater offense and any lesser offense necessarily included within it.[16] Although the defendant may have committed the lesser offense numerous times, usually only one lesser offense--the one that is the product of the same act that amounts also to the greater offense—is necessarily included in the greater. Thus, the defendant may have assaulted his victim on several occasions, but only the particular act of assault that results in the victim's death is necessarily included in the act condemned as murder. The earlier assaults are lesser offenses than, but cannot be considered lesser included offenses in, the actual crime of murder.[17]

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[16] That is true, for instance, of all the examples cited by Professor Wright (one act constitutes murder as well as second degree murder, manslaughter, and negligent homicide; one act constitutes robbery and larceny; one act constitutes rape and assault with intent to rape; one act constitutes assault with a deadly weapon and simple assault). 2 Wright, *supra,* at 372–373. See also *Stevenson* v. *United States,* 162 U.S. 313 (murder and manslaughter); *Sparf and Hansen* v. *United States,* 156 U.S. 51 (same).

[17] We believe that the decision of the Court of Appeals of Ohio in *Brown* v. *Ohio,* No. 75–6933, certiorari granted October 18, 1976, can be read as an illustration of this principle. There the defendant was prosecuted for automobile theft committed on November 29, 1973, after having pleaded guilty to a charge of operating the same vehicle on December 8, 1973, without the owner's consent. The court held that operating without the owner's consent was a lesser included offense of auto theft (Pet. No. 75–6993, App. 16), but it then ruled (*id.* at 17) that the defendant's

A Section 848 offense, however, in contrast to a single-act crime, is by definition a continuing offense during which a number of discrete lesser crimes will

operation of the car without the owner's consent on December 8 had been a different act from the theft and that therefore the two prosecutions did not place the defendant twice in jeopardy for the same crime. The decision can be read to say that, although operating without the owner's consent will be necessarily included in a theft when both are committed by a single act or are part of a continuous course of conduct, when the lesser offense is committed wholly independently it is not included in the greater. Such a holding would be unexceptional had the operation without the owner's consent occurred in one month and the theft in a later month, and in our view would be sound even when the crimes were committed in the reverse order (as they were in *Brown*) so long as the initial criminal episode (the theft) had come to an end before commencement of the second (the unauthorized use more than a week later).

Although the Ohio court's ruling that operating without the owner's consent is a lesser included offense of theft must be taken as an authoritative interpretation of state law, under the *Blockburger* test as it has been applied in federal cases by this Court—"focus[ing] on the statutory elements of [each] offense" (*Iannelli* v. *United States*, *supra*, 420 U.S. at 785 n. 17)—the two offenses as defined by the Ohio statutes (Pet. No. 75–6933, App. 15–16) would not be the same, since it is possible to steal an automobile without operating it (by towing it with another automobile, for example, or by loading it onto a trailer) and to operate it without the owner's consent without stealing it (the latter offense requiring proof of intent permanently to deprive the owner of possession). In short, each offense requires proof of an element that the other does not. It may be, then, that *Brown* v. *Ohio* turns on a peculiarity of Ohio law.

Finally, we note that *Brown* is in some respects similar to the federal cases involving theft and possession of the proceeds thereof. See, *e.g.*, *United States* v. *Gaddis*, 424 U.S. 544; *Heflin* v. *United States*, 358 U.S. 415. In such cases one might discern a legislative intent not to punish the thief for his subsequent possession of the loot (or, in *Brown*, his subsequent use of it), even if that

have been committed. Proof of some of those crimes is necessary to a conviction under that Section, but no one of them is a necessarily included offense, since it is possible for a defendant to engage in a continuing criminal enterprise without committing any particular lesser violation of the Act. But because it is not possible to commit a continuing criminal enterprise without also committing some underlying violations, those that the government charges are in one sense "lesser included" offenses even if they do not entirely satisfy the conventional definition of that term.

Thus, if a conspiracy were one of the underlying violations charged, then it would constitute a type of lesser included offense of the continuing criminal enterprise. In this case, however, the constituent offenses charged as part of the continuing enterprise were substantive offenses (distributing heroin and cocaine and possessing the drugs with intent to distribute them, in violation of Section 841(a)(1)).[18] It

possession is removed in time and place from the theft. See *Milanovich* v. *United States*, 365 U.S. 551. Where, as in *Brown*, such issues turn upon ascertaining the legislative purpose embodied in a State's statutory scheme, the matter may be inappropriate for determination by this Court.

[18] This case does not present the question whether a lesser included offense instruction on the constituent offenses might be appropriate, since neither petitioner nor the government requested, and accordingly the district court did not give, such an instruction on the underlying substantive violations. Petitioner did request a lesser included offense instruction on conspiracy (Tr. 1035), but that request was properly denied (Tr. 1044) because the govern-

follows that, since a conspiracy as a general matter is not necessarily included in a continuing criminal enterprise, and since in this case no conspiracy was charged against petitioner as part of the continuing criminal enterprise, his prosecution on the latter following his earlier conspiracy conviction did not amount to prosecution for a greater offense after conviction for a necessarily included offense.

III. EVEN IF CONSPIRACY IS A LESSER INCLUDED OFFENSE OF A CONTINUING CRIMINAL ENTERPRISE, SEPARATE PROSECUTION FOR EACH OFFENSE WAS NOT BARRED BY THE DOUBLE JEOPARDY CLAUSE

If the Court determines, contrary to our contentions, that Section 848 necessarily includes a conspiracy, then it must decide whether trial on the continuing criminal enterprise indictment was barred by petitioner's earlier conspiracy conviction. Petitioner contends (Br. 9–12) for a *per se* rule prohibiting prosecution for the greater offense whenever the defendant has already been convicted of a lesser included offense. We contend, to the contrary, that the Double Jeopardy Clause does not generally bar placing a defendant in jeopardy once upon a greater offense simply because he has theretofore been placed

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ment did not charge and was not required to prove a conspiracy as part of the continuing enterprise. It is true, as petitioner points out (Br. 8), that the district court included an instruction on the elements of conspiracy in its charge to the jury, but since the indictment did not allege a conspiracy and the government was not obliged to prove one, the instruction, although erroneous, could only have benefited petitioner.

in jeopardy on a lesser included offense. But regardless of the resolution of that question, even if a prosecution on the greater offense after conviction on the lesser might sometimes offend the Clause, in this case the successive prosecutions were permissible because they came about at petitioner's request (and against the government's wishes). We begin by discussing the latter point.

A. The indictment charging petitioner with conspiracy (A. 5) was returned on the same day as the indictment charging him with engaging in a continuing criminal enterprise (A. 3). The government moved (A. 12) to try the indictments together, urging (A. 13) that the offenses charged were "of the same or similar character" and that "much of the evidence" to prove the charges in the two indictments would be the same. Petitioner and his co-defendants in the conspiracy case opposed the motion, arguing that joinder was improper "for the reasons that neither the parties nor the charges are the same" (A. 15; see also A. 23 ("there is neither an identity of defendants nor an identity of charges")). The government, according to petitioner, was improperly attempting "to consolidate a conspiracy of ten (10) defendants with a substantive offense of one (1) defendant" (A. 18). The district court denied the government's motion and ordered that the indictments be tried separately.

Having thus succeeded in blocking consideration of the conspiracy and the continuing enterprise charges

in a single trial, petitioner completely reversed his position prior to trial in the present case and moved to dismiss the indictment on the ground that the government should have been required to try both charges together (A. 25, 29). He also argued (A. 30–31), as he does in this Court (Br. 7–9), that trial of the continuing criminal enterprise was barred because it was a greater offense of the conspiracy for which he had already been convicted. Reduced to its essentials, petitioner's argument is this: whenever a defendant who is charged with a crime having a lesser offense included within it can persuade the trial court to order that trial be had first on the lesser offense alone, then the Double Jeopardy Clause immunizes him from subsequent prosecution on the greater offense. We submit, on the contrary, that petitioner's successful request that the charges against him be tried in two trials rather than one placed him in the same position as a defendant who requests (or consents to) a mistrial or who successfully appeals his conviction. See generally Note, *Double Jeopardy: The Reprosecution Problem,* 77 Harv. L. Rev. 1272 (1964).

The Double Jeopardy Clause does not bar retrial of a defendant whose original trial is terminated by a mistrial granted at his own request. *United States* v. *Dinitz,* 424 U.S. 600. See also *United States* v. *Jorn,* 400 U.S. 470, 485 (plurality opinion) ("[A] motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution * * *."); *United States* v. *Tateo,* 377 U.S. 463, 467 ("If Tateo had

requested a mistrial on the basis of the judge's comments, there would be no doubt that if he had been successful, the Government would not have been barred from retrying him" (emphasis in original).). Indeed, numerous cases suggest that the result is the same if the defendant simply consents to rather than affirmatively requests a mistrial. *E.g., United States* v. *Jorn, supra,* 400 U.S. at 480, 484 (plurality opinion); *Downum* v. *United States,* 372 U.S. 734, 735–736; *Gori* v. *United States,* 367 U.S. 364, 368.[19]

The rationale behind the rule is clear and it applies with equal force to the present case: "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed * * *" (*United States* v. *Dinitz, supra,* 424 U.S. at 609). Here two trials came about not because of government harassment or inadvertence (cf. *Downum* v. *United States, supra*), but because petitioner insisted that this course be followed, fully aware and desirous that what he now claims violated his rights would occur.[20]

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[19] Indeed, even though the defendant had not consented to the mistrial in *Gori*, reprosecution was nevertheless allowed since the mistrial had been granted "in the sole interest of the defendant" (367 U.S. at 369).

[20] See also *United States* v. *Jamison*, 505 F. 2d 407, 413 (C.A.D.C.) ("The startling implication of barring reprosecution after a mistrial brought about by defense counsel's own errors and on his own motion is that the government could irrevocably lose the right to prosecute for a given crime without itself having committed the least impropriety, and with the trial judge having erred only in declining to second guess defense counsel as to the accused's best interests.").

The Double Jeopardy Clause also allows reprosecution following a successful appeal by the defendant of his conviction. *United States* v. *Dinitz, supra,* 424 U.S. at 609–610 n. 11; *Breed* v. *Jones,* 421 U.S. 519, 534; *United States* v. *Jorn, supra,* 400 U.S. at 484 (plurality opinion); *United States* v. *Tateo, supra,* 377 U.S. at 465–466; *Forman* v. *United States,* 361 U.S. 416; *Bryan* v. *United States,* 338 U.S. 552; *United States* v. *Ball,* 163 U.S. 662, 671–672. The rule has occasionally been explained in terms of a waiver by the defendant of his plea of former jeopardy, or of a continuation of the same jeopardy that attached at the commencement of the first trial (see *Green* v. *United States,* 355 U.S. 184, 189–194), but in more recent decisions of the Court it has been said to promote "an amalgam of interests" (*Price* v. *Georgia,* 398 U.S. 323, 329 n. 4) important to "the sound administration of justice" (*United States* v. *Tateo, supra,* 377 U.S. at 466; see also *Breed* v. *Jones, supra,* 421 U.S. at 534 ("Probably a more satisfactory explanation lies in analysis of the respective interests involved."); *United States* v. *Wilson,* 420 U.S. 332, 343–344 n. 11; *United States* v. *Jorn, supra,* 400 U.S. at 484 (plurality opinion)).

At least two such interests have been isolated, one especially important to defendants generally and the other to society at large. "From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pre-

trial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution" (*United States* v. *Tateo, supra,* 377 U.S. at 466). By analogy, it is safe to say that in the present case the district court would have been less receptive to petitioner's arguments against trial on both indictments together had it known that its rejection of the government's motion for consolidation might put petitioner beyond the reach of prosecution for the continuing criminal enterprise.

The second interest served by allowing retrial after reversal of a conviction is society's interest in bringing criminals to task. See *United States* v. *Dinitz, supra,* 424 U.S. at 610–611 n. 13; *United States* v. *Jorn, supra,* 400 U.S. at 484 (plurality opinion); *United States* v. *Tateo, supra,* 377 U.S. at 466. "While overemphasis of this factor may lead to abuse and a deprivation of the rights of the accused, in circumstances where the risk of harassment is slight and that of improper acquittal is great the state's interest in securing convictions should be given considerable weight." Note, *supra,* 77 Harv. L. Rev. at 1274. In the present case the risk of harassment was nonexistent, and, although before his trial on the continuing enterprise no jury had yet found petitioner guilty of that offense, the charge laid was serious—the most serious that Congress has defined in its effort to curb drug-dealing in this country. "Fairness to society" (*Price* v. *Georgia, supra,* 398 U.S. at 329 n. 4) supports our position that petitioner's trial for engaging

in a continuing narcotics enterprise was not barred by his fulfilled desire to have the conspiracy charge tried separately.

Petitioner objects to the result we seek on the ground (Br. 23–24) that his successful resistance to a single trial of both indictments was not a waiver of his double jeopardy rights under the knowing, intelligent, and voluntary standard enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458. The respondent in *United States* v. *Dinitz, supra*, made the same argument with respect to his successful request for a mistrial. It was rejected there for reasons equally pertinent here, where "traditional waiver concepts have little relevance" (424 U.S. at 609).[21] "[T]he policy of the Double Jeopardy Clause, weighed as it always must be against the interest of the state in pursuing criminal prosecutions to their conclusions, is simply not thought to require that a defendant be free of further prosecutions when it was he, and not the judge or prosecutor, who sought to have the original prosecution [post-

[21] In *Dinitz* the Court catalogued (424 U.S. at 609–610 n. 11) the cases in which it had "implicitly rejected the contention that the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right. See *Breed* v. *Jones*, 421 U.S. 519, 534; *United States* v. *Wilson*, 420 U.S. 332, 343–344, n. 11; *United States* v. *Jorn*, 400 U.S. 470, 484–485, n. 11 (plurality opinion); *United States* v. *Tateo*, 377 U.S. at 466."

Even if the *Johnson* v. *Zerbst* standard were otherwise applicable in double jeopardy cases, petitioner's deliberate, tactical decision to oppose a single trial on both indictments would preclude him from invoking it. See *Henry* v. *Mississippi*, 379 U.S. 443, 450–453.

poned]" (*United States* v. *Jamison, supra*, 505 F. 2d at 412). See also *Ludwig* v. *Massachusetts*, No. 75–377, decided June 30, 1976, slip op. 13; *United States ex rel. Jackson* v. *Follette*, 462 F. 2d 1041, 1052–1053 (C.A. 2) (Mansfield, J., concurring), certiorari denied, 409 U.S. 1045.[22]

B. The successive prosecutions in this case can be justified under a broader rationale than that just advanced. We submit that prosecution for the greater offense is always permissible after conviction on the lesser, so long as the defendant is not placed twice in jeopardy for either offense. At the very least, prosecution of the greater offense should be allowed whenever the government was unable to or could not reasonably have been expected to try that offense at the time of the trial of the lesser included offense.

[22] Petitioner also argues (Br. 22–23) that *Simmons* v. *United States*, 390 U.S. 377, protects him from having to choose between defending against both charges in a single trial (which he claims would violate due process) and defending against them in two trials (which he claims would violate the Double Jeopardy Clause). In *Simmons* the Court held that a defendant's testimony (at a suppression hearing) that is necessary to vindication of his Fourth Amendment rights cannot be used against him at trial, in derogation of his Fifth Amendment privilege against compelled self-incrimination, lest to assert one constitutional right he be made to forego another. *Simmons* does not support petitioner's effort to avoid prosecution for the continuing criminal enterprise, for if that offense and conspiracy are—as petitioner asserts—simply greater and lesser degrees of the same crime, then petitioner had no constitutional right not to have them tried together in the first place. And if—as we contend—they are different crimes, then petitioner had no right under the Double Jeopardy Clause not to be prosecuted for them in separate trials.

In its relation to the Double Jeopardy Clause, the lesser included offense doctrine is a type of test for identity of offenses. As such, it implements two essential purposes of the Double Jeopardy Clause itself, *viz.*, to guarantee that a convicted defendant will not suffer for his crime any more punishment than the legislature thought appropriate, and to accord finality to verdicts in criminal cases. *United States* v. *Dinitz, supra,* 424 U.S. at 606; *United States* v. *Jorn, supra,* 400 U.S. at 479 (plurality opinion); see *North Carolina* v. *Pearce,* 395 U.S. 711, 717; *Green* v. *United States, supra,* 355 U.S. at 187–188; Note, *supra,* 75 Yale L.J. at 277–278; Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee,* 65 Yale L.J. 339, 340–341 (1956); Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution,* 28 U. Chi. L. Rev. 591, 593–594 (1961).

Thus, when two offenses stand in relation to each other as a greater and a lesser included, they may in some respects be considered the same offense for double jeopardy purposes, with the result (1) that cumulative punishment is forbidden on the assumption that, in fixing the penalty for the greater, the legislature necessarily took into account the punishment deserving on the lesser offense as well, and (2) that prosecution for one of the offenses following trial on the other is in certain cases forbidden.

Whenever the greater offense is prosecuted first, a subsequent prosecution on the lesser included offense

is properly barred because the defendant will have been in jeopardy on that offense during trial of the greater. Conviction and punishment on the greater is tantamount to a conviction and punishment on the lesser offense as well, and the risk of these consequences constitutes jeopardy and bars the second trial even if the first trial results in an acquittal.[23] See *Breed* v. *Jones, supra,* 421 U.S. at 528 ("Jeopardy denotes risk."); *Price* v. *Georgia,* 398 U.S. 323, 326, 329; *In re Nielson,* 131 U.S. 176, 187–190; *Grafton* v. *United States,* 206 U.S. 333, 349–352. Cf. *United States ex rel. Jackson* v. *Follette, supra,* 462 F. 2d at 1044–1045.

Similarly, when the lesser offense is tried first and results in acquittal, prosecution on the greater is properly barred in every case because the defendant

[23] In most prosecutions for a greater offense either party will be entitled upon request to a lesser included offense instruction (see *Keeble* v. *United States,* 412 U.S. 205; *Sansone* v. *United States,* 380 U.S. 343; *Berra* v. *United States,* 351 U.S. 131) and when such an instruction is given the defendant will clearly have been tried simultaneously on both offenses. But even in those cases where the evidence precludes a lesser included offense instruction and allows the jury only the choice between conviction on the greater offense or acquittal (see, *e.g., Sparf and Hansen* v. *United States, supra*), the possibility of conviction and punishment on the greater is tantamount to jeopardy on the lesser. *Fuller* v. *United States,* 407 F. 2d 1199, 1227–1229 (C.A.D.C.) (*en banc*), certiorari denied, 393 U.S. 1120. Indeed, even where no lesser included offense instruction is given and the defendant's conviction on the greater offense is overturned on appeal, the appellate court may in an appropriate case order that judgment of conviction be entered on the lesser included offense. See *Tinder* v. *United States,* 345 U.S. 565; cf. *United States* v. *Swiderski,* C.A. 2, No. 76–1415, decided February 1, 1977; *Austin* v. *United States,* 382 F. 2d 129, 137–143 (C.A.D.C.).

cannot have committed an offense having as an essential element another offense of which he has been absolved. The acquittal on the lesser is tantamount to an acquittal on the greater, and the Double Jeopardy Clause forbids the government from a further attempt at conviction. *Grafton* v. *United States, supra.*

But when the lesser included offense is tried first and results in conviction, it does not follow that subsequent prosecution for the greater offense will necessarily run afoul of the Double Jeopardy Clause. This Court held as much in *Diaz* v. *United States,* 223 U.S. 442, where, following the defendant's conviction for assault and battery, the victim died and a charge of homicide was brought. The Court approved the second prosecution, pointing out (*id.* at 449) that the defendant had not been in jeopardy for the homicide at the trial for assault and battery, and that "[a]ll that could be claimed for [the jeopardy at that trial] was that it protected the accused from being again prosecuted for the assault and battery, and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide, as otherwise might have been done * * *."[24]

[24] Although *Diaz* was decided under a double jeopardy statute enacted by Congress to apply in the Philippine Islands, rather than under the Double Jeopardy Clause of the Fifth Amendment, the language of the former ("No person, for the same offense, shall be twice put in jeopardy of punishment"; see *Gavieres* v. *United States*, 220 U.S. 338, 341) was quite similar to that of the latter ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb"; U.S. Const., Fifth Amendment), and decisions under the statute have frequently been treated by this Court as authority in cases arising under the constitutional provision. *E.g., Blockburger* v. *United States, supra*, 284 U.S. at 304 (citing *Gavieres, supra*); *Price* v. *Georgia, supra*, 398 U.S. at 327–329 (citing an authoritative *Kepner* v. *United States*, 195 U.S. 100, decided under the statute); but see *Green* v. *United States*, 355 U.S. 184, accepting *Kepner* but distinguishing *Trono* v. *United States*, 199 U.S. 521, for having been decided under the statute.

In the present case petitioner was not in jeopardy of conviction for the continuing criminal enterprise during his conspiracy trial. Nor was he in jeopardy on the conspiracy charge during his trial for the continuing criminal enterprise, since conspiracy was not treated as a lesser included offense of that crime. In short, he has not been "twice put in jeopardy" (U.S. Const., Fifth Amendment) for either offense, and the subsequent prosecution for the continuing enterprise was therefore proper under *Diaz.*[25]

[25] Our position does not leave a defendant at the mercy of a prosecutor bent on carving up a crime into one or more lesser included offenses and bringing them in a series of piecemeal prosecutions in ascending order of seriousness, for even if the successive prosecutions never place the defendant twice in jeopardy for the same offense the procedure might nevertheless be so unfair as to violate due process. Cf. *Blackledge* v. *Perry*, 417 U.S. 21, and *North Carolina* v. *Pearce*, 395 U.S. 711, where this Court held that a defendant who successfully appeals his conviction is protected upon retrial against prosecutorial or judicial vindictiveness by the Due Process Clause rather than the Double Jeopardy Clause. In this case, however, where the government sought to try both offenses together but was prevented from doing so by order of the district court, the successive prosecutions did not violate due process. "[I]t cannot be oppressive for the prosecution to do what the court has told it that it must do." *Connelly* v. *D.P.P.*, [1964] 2 All E.R. 401, 437–438.

Diaz has been read as standing for the proposition that "jeopardy will not attach to the first trial of an offense arising out of the same criminal episode where, at the time of the first prosecution, the offense was not completed." *Culberson* v. *Wainwright,* 453 F. 2d 1219, 1220 (C.A. 5); see also *Blackledge* v. *Perry,* 417 U.S. 21, 29 n. 7; Lugar, *Criminal Law, Double Jeopardy and Res Judicata,* 39 Iowa L. Rev. 317, 322 (1954); Note, *Criminal Law—Double Jeopardy,* 24 Minn. L. Rev. 522, 545 (1940). In our view it stands for the broader proposition just advanced—that prosecution for the greater offense following conviction of a lesser included offense is permissible so long as a second jeopardy is avoided. At the very least, however, we submit that *Diaz* supports a rule allowing prosecution of the greater offense whenever for legitimate reasons the government could not have charged it at the trial of the lesser offense.

Thus, in *Blackledge* v. *Perry, supra,* where the Court held that due process was violated when the State brought a more serious charge against a defendant who had exercised his statutory right to trial *de novo* of a minor charge of which he had been convicted, the Court noted (417 U.S. at 29 n. 7) that "[t]his would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in *Diaz* v. *United States* * * *." And Mr. Justice Brennan, concurring in *Ashe* v. *Swenson,* 397 U.S. 436, 453 n. 7, cited *Diaz* in support of the statement

that "where a crime is not completed or not discovered, despite diligence on the part of the police, until after the commencement of a prosecution for other crimes arising from the same transaction, an exception to the 'same transaction' rule should be made to permit a separate prosecution." See also *United States* v. *Jamison, supra,* 505 F. 2d at 416–417.

Professor Friedland states this position succinctly in describing the English rule (Friedland, *Double Jeopardy* 192 (1969)):

> [T]he rule against splitting a case should not apply * * * when the prosecutor could not have initially charged the accused with the offence subsequently charged. This would encompass situations where it was not legally possible to do so, as in the intervening death cases, as well as those in which the prosecutor could not, at the time of the first trial, have known by the exercise of reasonable diligence of the commission of the offenses subsequently charged or, perhaps, because extended investigation would be necessary before the Crown would be ready to proceed with the further charges.[1]

[1] See *Williams and Wilson* [1965] N.I. 52 at p. 61, in which the "Crown proceeded with the first trial at a time when its investigations into the offenses which became the subject of the second prosecution were not complete—probably because they involved dealings or alleged dealings on the Continent" and thus did not know of the further offences; the Court held that in these circumstances a second prosecution was not improper. * * *

See also *id.* at 101–103, 185, 188–191; cf. Note, *supra,* 75 Yale L.J. at 295 (where the defendant successfully objects to compulsory joinder "severance should be granted, and the prosecutor should be allowed to re-prosecute on the severed count").[26]

A fortiori, the "rule against splitting a case" does not apply where, as here, the prosecution sought to try both offenses together but the defendant convinced the trial court to prohibit that course.

The rule for which we contend fully respects the values protected by the Double Jeopardy Clause. When the greater offense was not known, or for any other legitimate reason could not have been tried simultaneously with the lesser included offense for which the defendant has already been convicted, it cannot be said that in bringing the greater to trial the government threatens the validity of a prior acquittal (see Note, *supra,* 75 Yale L.J. at 278) or engages in "repeated attempts to convict an individual for an alleged offense * * * enhancing the possibility that even though innocent he may be found guilty" (*Green* v. *United States, supra,* 355 U.S. at 187–188). A conviction on the greater offense will not be one "for whose justice no man could vouch," and the trial

[26] In *Connelly* v. *D.P.P.*, [1964] 2 All E.R. 401, where a rule of practice prevented the defendant from being charged in one case with both murder and aggravated robbery occurring during the same criminal episode, the court (House of Lords) allowed successive prosecutions notwithstanding the rule against splitting a case. See *id.* at 406 ("[W]here it would have been improper to combine the charges * * * or where the accused has accepted without demur the prosecutor's failure so to combine the charges, a second indictment is allowable.") (Lord Reid); see also *id.* at 412 (Lord Morris); *id.* at 446 (Lord Devlin).

itself does not smack of "the callousness of repeated prosecutions" that the Double Jeopardy Clause was intended to prohibit (*id.* at 219, Frankfurter, J., dissenting). If the defendant has successfully concealed the full extent of his crime (or, as here, successfully resisted simultaneous prosecutions), he should not be heard to object that he "live[s] in a continuing state of anxiety and insecurity," or that he suffers "embarrassment, expense and ordeal" (*id.* at 187) by the trial itself. Finally, the defendant will not have been in jeopardy of conviction of and punishment for the greater offense at trial of the lesser, nor will he be in jeopardy of conviction of or punishment for the lesser at trial of the greater. See *Diaz* v. *United States, supra,* 223 U.S. at 449.[27] In sum, the prosecution for the greater offense in the circumstances outlined here vindicates society's interest in the enforcement of its criminal laws, yet subjects the defendant to none of the oppressive practices that the Double Jeopardy Clause forbids.

C. *Waller* v. *Florida,* 397 U.S. 387, does not declare a *per se* prohibition against prosecution for a greater offense in all cases where the defendant has been convicted of a lesser included offense. There the issue

[27] As we have indicated (p. 17, *supra*), double punishment is avoidable by crediting any penalty imposed upon the lesser offense in fixing the penalty for the greater. See Note, *supra,* 75 Yale L.J. at 289 n. 128, 291 n. 132. If after conviction of the greater offense the defendant can show adverse collateral effects resulting from the continued appearance on his record of the conviction for the lesser included offense, then presumably he would be entitled to have that conviction vacated. *Fuller* v. *United States, supra,* 407 F. 2d at 1233 n. 52.

was "the asserted power of * * * two courts within one State to place petitioner on trial for the same alleged crime" (*id.* at 390). Although the decision proceeded on the premise that a lesser and a greater offense are the same for double jeopardy purposes, the Court's inquiry focused on the applicability of the federal-state "dual sovereignty" decisions (*Bartkus* v. *Illinois,* 359 U.S. 121; *Abbate* v. *United States,* 359 U.S. 187) to separate state and municipal prosecutions, and therefore the Court cannot be said to have passed on the issue presented here. See *Culberson* v. *Wainwright, supra,* 453 F. 2d at 1220. Indeed, in both *Waller* itself (see 397 U.S. at 395) and *Robinson* v. *Neil,* 409 U.S. 505, 506 (ruling that *Waller* is retroactive), the Court described the holding in that case in terms of dual sovereignty alone.[28]

Moreover, the acts that were the subject of the successive prosecutions in *Waller* (destruction of city property and disorderly breach of the peace in municipal court, and grand larceny in the state court) occurred at the same time and might have been prosecuted in one trial.[29] The question whether the greater offense may in some circumstances be prosecuted after

[28] That the question of the permissibility of prosecuting the greater offense after conviction on the lesser remained open after *Waller* seems plain from the manner in which the Court declined to reach it in *Blackledge* v. *Perry, supra,* 417 U.S. at 25, as well as from the grant of certiorari in *Brown* v. *Ohio, supra.*

[29] *Waller* did not indicate whether either of the courts involved would have had jurisdiction over the offenses charged in the other, or whether separate prosecutions might have been allowed if complete jurisdiction did not lie in either court. Cf. *Ashe* v. *Swenson, supra,* 397 U.S. at 455 n. 11 (Brennan, J., concurring).

conviction of the defendant of a lesser offense at a time when the greater could not have been charged and tried simply was not presented and cannot be said to have been adjudicated. See *Stone* v. *Powell,* No. 74–1055, decided July 6, 1976, slip op. 12–14 and nn. 14, 15.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1805

GARLAND JEFFERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Petitioner, Garland Jeffers, responds to Arguments II and III as contained in the Solicitor General's Brief.

The Government's position in Argument II A. (Brief, pages 18-32) is that *Iannelli v. United States,* 420 U.S. 770, is controlling. This 1975 decision permitted conviction of a 1955 gambling offense and a 371 conspiracy. The government points out that the Iannelli decision held that the statutory requirements of the gambling offense did not require proof of a conspiracy, and therefore the traditional Wharton's rule did not

apply. The government then claims that the wording in the continuing criminal enterprise offense also does not require proof of a conspiracy, and thus Iannelli controls. The definition of a continuing criminal enterprise requires that a series of drug violations be undertaken "in concert with five or more other persons" with whom the violator occupies a position of manager and from which substantial income is derived. 21 U.S.C. §848. Petitioner, in his original brief, emphasized to the Court, that the definition of a continuing criminal enterprise contained an element of conspiracy. Petitioner has argued that a series of drug violations taken "in concert" with five or more means that there must be some agreement. The government's response is that the phrase "in concert" does not mean that there must be an agreement. Petitioner simply points out that "in concert" means an agreement, and the presence of the phrase "in concert" can not be ignored.

Also, in regard to Argument II A., the government has conceded that the Seventh Circuit was in error in holding that Iannelli created a new double jeopardy rule concerning complex statutory crimes. (See Government's Brief, p. 22, n. 10.) Therefore, the government does not attempt to uphold the analysis and reasoning of the Seventh Circuit when it held that the lesser included offense rule should not apply to complex statutory crimes. See Petition for Writ, Appendix p. 15. The government's justification of multiple prosecutions is simply that a conspiracy is not a lesser included offense of a criminal enterprise and even if it is such prosecution is not prohibited by the double jeopardy clause.

Argument II B. focuses on some of the legislative background of the continuing criminal enterprise statute. The argument is that Congress intended to have separate offenses for conspiracy to distribute and a continuing criminal enterprise. Congress obviously enacted two prohibitions, but the simple fact that two statutory provisions are involved does not make them separate for double jeopardy purposes. Petitioner argues that the Gavieres-Blockburger test is still controlling. In other words, the statutory definitions of the two crimes must be examined to determine if they are the same for double jeopardy purposes. Jeffers concedes that Congressional intent may be relevent on multiple punishments. But on the issue of multiple prosecutions, the Court has to determine, under traditional doctrines, if the offenses are the same. This is not determined on whether there are two statutes' violations, but rather if one of the crimes is a lesser included offense of the other. Jeffers has contended that a §848 criminal enterprise is a continuing offense, and that its underlying base is a conspiracy. The statute requires, as an essential element, that the series of drug violations be done "in concert" with others. Thus, there is a statutory requirement of a conspiracy. The lesser included offense rule is an accepted double jeopardy doctrine and if Congress includes a conspiracy as an element in a continuing criminal enterprise multiple prosecutions are prohibited. See *Waller v. Florida*, 397 U.S. 387 (1970) and *Robinson v. Neil*, 409 U.S. 505 (1973).

Argument II C. focuses on punishment cases as decided by several of the various Circuits. See cases cited in *United States v. Papa*, 533 F.2d 815 (2d Cir.), cert. denied, ____ U.S. ____ (1976). Petitioner

contends that the multiple punishment cases which do not result from multiple prosecutions are not controlling on this case.

Argument II D. acknowledges that a continuing criminal enterprise "does not fit comfortably into the mold of conventional double jeopardy analysis." Government's Brief, page 28. The government appears to argue that because a criminal enterprise requires a series of violations of any of the drug laws none of the laws are necessarily required to be violated. Petitioner argues that one essential element of a criminal enterprise is that whatever series of violations occur that they are undertaken "in concert" with others. Thus, every criminal enterprise prosecution will require the proof that there was an underlying conspiracy. Jeffers would also direct the Court's attention to the indictment and that Jeffers was charged with undertaking "such (drug) distribution in concert with five or more other people with respect to whom he occupied a position of organizer, supervisor and manager. . . ." See Appendix, page 3. The government has argued that only §841 substantive offenses were charged in the indictment; this is not accurate. Jeffers' indictment clearly and concisely lists concerted action as an element of the continuing criminal enterprise. The statute requires concerted action and the indictment charged concerted action.

The gist of Argument II is that conspiracy is not a requirement of a continuing criminal enterprise. For this to be true the language "in concert" as appears in the statute will have to be construed to mean "not in concert". It is unreasonable to ask this Court to construe a statute to read the opposite of the language it contains. Thus, a conspiracy is a lesser included offense of a continuing criminal enterprise.

Argument III A. appears in the Government's Brief, pages 33-39. All of Argument III assumes that a conspiracy is a lesser included offense but argues that the second prosecution is still valid. Argument III A. claims that Jeffers' objections to the trial together prevented the government from being able to prosecute him in one trial. Jeffers would point out to the Court that the objections to the trial together were filed by all of the defendants in the conspiracy case. Jeffers was one of these defendants and joined in the motion. The basis of the motion was that there would be prejudice to all of the defendants if the conspiracy case were tried with the criminal enterprise case. The trial court agreed and did not allow the consolidation for trial. The government claims that Jeffers "succeeded in blocking consideration of the conspiracy and the continuing enterprise charges in a single trial." See Government's Brief, pp. 33-34. This is simply not accurate.

Jeffers argues that his objections to a consolidation of the two charges was to protect his Sixth Amendment right to a fair trial. Jeffers claimed prejudice if he were tried with the ten other defendants in the conspiracy indictment. The other defendants in the conspiracy case claimed prejudice if they were tried with the two charges against Jeffers. Jeffers' claim was not basically that his two charges could not be tried together, but that the presence of the other conspiracy defendants would be prejudicial. See Appendix, pp. 15-24. The government's contention is that Jeffers made a "deliberate, tactical decision to oppose a single trial on both indictments." Government's Brief, p. 38, n. 21. This is not correct, and the government's interpretation of what occurred is also not correct. The objections to

the trial together could only have prevented a joint trial of all ten conspiracy defendants with Jeffers on the continuing criminal enterprise charge. This action is not at all like a defendant requesting a mistrial with its obvious consent to a retrial. See *United States v. Dinitz*, 424 U.S. 600 (1976).

The government is at fault for the successive prosecutions. The government could have requested that Jeffers be severed from the conspiracy trial, and that he be tried alone on both of the charges. The government had to option to try Jeffers with the rest of the conspiracy defendants or to sever him and try him alone. The government chose to try Jeffers on the conspiracy charge first. Jeffers contends that when the government proceeds to trial on the lesser offense, instead of the greater offense, it is without right thereafter to prosecute on the greater. See *People v. Krupa*, Calif., 149 P.2d 416 (1944). Also, the government could have dismissed the conspiracy charge and simply tried Jeffers on the heavier charge. The decision to try Jeffers on the conspiracy charge prior to the criminal enterprise charge was made by the government and not by Jeffers. Jeffers contends that this type of piecemeal prosecution is precisely what the Constitution prohibits.

The government has cited at length from cases dealing with retrial problems following mistrials and successful appeals. See Government's Brief, pp. 33-37. These holdings are not relevant to a case of multiple prosecution and conviction.

Argument III B. contends that there may be successive prosecutions. That is, the government claims "that prosecution for the greater offense is always permissible after conviction on the lesser, so long as the

defendant is not placed twice in jeopardy for either offense." Government's Brief, p. 39. The government seems to claim that it may prosecute from the bottom of the ladder to the top. This Court's decisions in *Waller v. Florida*, 397 U.S. 387 (1970) and *Robinson v. Neil*, 409 U.S. 505 (1973) are incorrect if the government's position is followed. Piecemeal prosecution is illogical and unconstitutional. On remand the trial Court in *Robinson v. Neil*, 366 F. Supp. 924, 928 (E.D. Tenn. 1973), made this clear:

> If the State were allowed to initiate separate prosecutions against a defendant for every crime up the ladder from the lesser to the greater offense, the potential for abuse and oppression would be too great to be tolerated in a society concerned for the rights of the individual. The double jeopardy clause stands as a bar to such a potential.

CONCLUSION

In conclusion, Jeffers contends that the government has failed to show that the phrase "in concert" in the continuing criminal enterprise statute does not mean what it says. Jeffers argues that a conspiracy is an essential element of a criminal enterprise, and that the lesser included offense rule applies to the multiple prosecutions of Jeffers.

Jeffers contends that there is no valid authority for the government's position that a conviction on a lesser included offense does not bar prosecution for the greater. The authority is to the contrary. Jeffers requests this Court to reverse his conviction for a continuing criminal enterprise and hold his prosecution barred by the double jeopardy clause.

Respectfully submitted,

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